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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 427

JACK TRUPIANO, ROMILDO RICCARDELLI, ANTHONY ANTONIOLE AND RIORDAN J. A. ROETT, JR., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED NOVEMBER 5, 1947.

CERTIORARI GRANTED DECEMBER 15, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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JACK TRUPIANO, ROMILDO RICCARDELLI, ANTHONY ANTONIOLE AND RIORDAN J. A. ROETT, JR., PETITIONERS,

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JAN. 5, 1948.

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1947

No. 9394

UNITED STATES OF AMERICA, Appellee,

v.

JACK TRUPIANO, ROMILDO RICCIARDELLI, ANTHONY ANTONIOLE and RIORDAN J. A. ROETT, JR., Appellants

Appeal from the District Court of the United States for the District of New Jersey

Appendix to Appellant's Brief

DOCKET ENTRIES

1947

Feb. 5. Petition to Suppress Evidence and Notice of Motion filed on Feb. 1, 1947.

Feb. 5. Notice of Allocation of case to Trenton filed.

Feb. 10. Hearing on motion to Suppress Evidence—Decision reserved (Forman).

Feb. 11. Affidavit of Oliver J. Gettel filed on 2/10/47.

Feb. 11. Affidavit of Berthold O. Nilsen filed on 2/10/47.

Feb. 11. Affidavit of Homer Casey filed on 2/10/47.

Feb. 11. Affidavit of William A. Vandecar filed on 2/10/47.

Mar. 5. Opinion denying motion to suppress filed on 3/4/47 (Forman).

Mar. 31. Order denying motion to suppress filed (Forman).

Apr. 3. Notice and Grounds of Appeal filed on 4/1/47.

Apr. 14. Assignments of Errors filed on Apr. 12, 1947.

Apr. 22. Stipulation in lieu of Designation of contents of record on appeal filed.

[fol. 2] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

NOTICE FOR PETITION TO SUPPRESS EVIDENCE—Filed February 1, 1947

To the Hon. Edgar H. Rossbach, United States District Attorney, Post Office Building, Newark, New Jersey.

Please take notice that upon the verified petition of Jack Trupiano, Romildo Ricciardelli, Anthony Antoniole and Riordan J. A. Roett, Jr., petitioners, upon a certain complaint made against the defendants and upon all of the proceedings heretofore had wherein a motion will be made in the United States District Court for the District of New Jersey, Post Office Building, Trenton, New Jersey on the 10 day of February, 1947, or as soon thereafter as counsel can be heard for the following relief:

1. That all papers, records and documents and other property seized by the Government be returned to the defendants.

2. That any and all still equipment, mash, alcohol, and other property so seized be suppressed and that the United States Attorney for the District of New Jersey and the Agents of the Alcohol Tax Unit and their aid-s be restrained from using the aforesaid property, matters and things in any trial or hearing; and any information directly or indirectly obtained therefrom and by means thereof.

3. That all such property so unlawfully seized be returned to the petitioners and for such other and further relief as may be just and proper.

Respectfully, Anthony A. Calandra, Attorney for Petitioners.

[fol. 3] IN UNITED STATES DISTRICT COURT

PETITION TO SUPPRESS EVIDENCE—Filed February 5, 1947

Now Comes the Defendants Jack Trupiano, Romildo Ricciardelli, Anthony Antoniole and Riordan J. A. Roett, Jr., and state and allege as follows:

1. That the complaint made on or about June 4th, 1946 charged the defendants with violation of the Internal Revenue Laws of the United States of America in that the defendants possessed, owned and controlled, a still, operated a distillery, fermented mash and possessed and concealed alcohol, contrary to the provisions of the statute in such cases made and provided.

2. That on the night of June 3rd, 1946 the defendants were arrested at the Kell Farm, in Wall Township, Monmouth County, New Jersey by agents of the Alcohol Tax Unit without a warrant for their arrest and said agents unlawfully seized their property, to wit: a still, alcohol, mash and other equipment necessary and appertaining thereto without a search warrant.

3. The said agents had no right to enter the premises and make a search and seizure and arrest the defendants.

4. Defendants claim that their rights were invaded at the arrest and seizure of the aforesaid property and ask and pray for the return thereof and that the evidence, if it is intended to be used against them obtained without a lawful search warrant, be suppressed under the provisions of the Fourth and Fifth Amendments of the United States Constitution; and further pray that all such evidence be excluded and suppressed at any trial or hearing that may be had by virtue of the complaint made by the said agents as aforesaid and that all of the aforesaid property so unlaw-
[fol. 4] fully seized without a search warrant and obtained by means of a trespass should be returned.

Jack Trupiano, Romildo Ricciardelli, Anthony Antoniole, Riordan J. A. Roett, Jr.

AFFIDAVIT OF PETITIONERS

STATE OF NEW JERSEY,
County of Essex, ss.:

Jack Trupiano, Romildo Ricciardelli, Anthony Antoniole and Riordan J. A. Roett, Jr., each severally being duly sworn according to law on their oaths depose and say:

1. That they are the petitioners named in the foregoing petition and that they have read and know the contents of the foregoing petition and that the same is true to the best of their knowledge, information and belief.

Jack Trupiano, Romildo Ricciardelli, Anthony Antoniole, Riordan J. A. Roett, Jr.

Sworn and subscribed to before me this — day of October, A. D. 1946.

[fol. 5]

Proceedings Before the United States Commissioner

Asbury Park, New Jersey,

Tuesday, June 18, 1946.

Before Commissioner David Goldstein

APPEARANCES:

For the Government John A. Waldron, Esq., Assistant United States Attorney.

Samuel Cohen, Esq., Legal Assistant to the Alcohol Tax Unit.

For the Defendants Anthony A. Calandra, Esq.

* * * * * * *

COMPLAINT AGAINST SAMUEL MONTICELLO

UNITED STATES OF AMERICA,
District of New Jersey, ss.:

Before me, David Goldstein, a United States Commissioner for the District of New Jersey, this day personally appeared William A. Van De Car, who being first duly

sworn, deposes and says that on or about the 3rd day of June, 1946, at the Kell Farm in Wall Township, Monmouth County, in said District, Samuel Monticello, 151 So. Munn Avenue, Newark, N. J. unlawfully, knowingly, and wilfully,

First Count: In violation of 27 USC 203, engaged in the business of distilling distilled spirits, without a basic permit as therein prescribed; and

[fol. 6] Second Count: In violation of Sec. 2900 (a) of the Internal Revenue Code, failed to pay the tax on distilled spirits, distilled as aforesaid; and

Third Count: In violation of Sec. 2803 (a) of the Internal Revenue Code, possessed distilled spirits, the immediate containers of which did not have affixed thereto the requisite stamp; and

Fourth Count: In violation of Sec. 2810 (a) of the Internal Revenue Code, had in his possession and custody, and under his control, a still and distilling apparatus set up, which was not duly registered with the collector of the district in which it is; and

Fifth Count: In violation of Sec. 2812 (a) of the Internal Revenue Code, engaged in the business of a distiller without giving the notice required by said subsection; and

Sixth Count: In violation of Sec. 2814 (a) of the Internal Revenue Code, engaged in the business of a distiller without giving the notice prescribed by said subsection, and without executing a bond prescribed therein; and

Seventh Count: In violation of Sec. 2833 (a) of the Internal Revenue Code, engaged in and carried on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him; and

Eighth Count: On May 31, 1946, in violation of Sec. 2803 (a) of the Internal Revenue Code, transported distilled spirits, the immediate containers of which did not have affixed thereto a stamp denoting the quality of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed on such spirits; and

[fol. 7] Ninth Count: On May 31, 1946, in violation of Sec. 2913 of the Internal Revenue Code, removed distilled spirits on which the tax had not been paid, to a place other than the internal revenue bonded warehouse provided by law;

All contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States.

(Deponent's Signature) William A. Van De Car.
(Title) Investigator of the Alcohol Tax Unit, United States Treasury Department.

Sworn to and subscribed in my presence this 4th day of June, 1946. David Goldstein, United States Commissioner, District of New Jersey. (Seal.)

[fol. 8] Complaint Against Jack Trupiano et al.

United States of America,
District of New Jersey, ss:

Before me, David Goldstein, a United States Commissioner for the District of New Jersey, this day personally appeared William A. Van De Car, who being first duly sworn, deposes and says that on or about the 3rd day of June, 1946, at the Kell Farm in Wall Township, Monmouth County, in said District, Jack Trupiano, 58 Belmont Ave., Belleville, N. J., Romildo Riccardelli, 179 So. Essex Ave., Orange, N. J.; Anthony Antoniele, 600 Columbus St., Alexandria, Va.; Frank Pugliese, 336 13th Ave., Newark, N. J.; Riordan J. A. Roett, Jr., 109 Essex St., Hackensack, N. J.; and Joseph Monticello, 151 So. Munn Ave., Newark, N. J. unlawfully, knowingly, and wilfully,

First Count: In violation of 27 U. S. C. 203, engaged in the business of distilling distilled spirits, without a basic permit as therein prescribed; and

Second Count: In violation of Sec. 2800 (a) of the Internal Revenue Code, failed to pay the tax on distilled spirits, distilled as aforesaid; and

Third Count: In violation of Sec. 2803 (a) of the Internal Revenue Code, possessed distilled spirits, the immediate containers of which did not have affixed thereto the requisite stamp; and

Fourth Count: In violation of Sec. 2810 (a) of the Internal Revenue Code, had in their possession and custody, and under their control, a still and distilling apparatus set up, which was not duly registered with the collector of the district in which it is; and

[fol. 9] Fifth Count: In violation of Sec. 2812 (a) of the Internal Revenue Code, engaged in the business of distillers without giving the notice required by said subsection; and

Sixth Count: In violation of Sec. 2814 (a) of the Internal Revenue Code, engaged in the business of distillers without giving the notice prescribed by said subsection, and without executing a bond prescribed therein; and

Seventh Count: In violation of Sec. 2833 (a) of the Internal Revenue Code, engaged in and carried on the business of distillers with intent to defraud the United States of the tax on the spirits distilled by them;

All contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States.

(Deponent's Signature) William A. Van De Car.
(Title) Investigator of the Alcoholic Tax Unit, United States Treasury Department.

Sworn to and subscribed in my presence this 4th day of June, 1946. David Goldstein, United States Commissioner, District of New Jersey. (Seal.)

* * * * * * *

[fol. 10] William Van De Car, being first duly sworn in behalf of the Government, testified as follows:

Direct examination,

By Mr. Waldron:

Q. Mr. Van De Car, what is your official position?

A. I am an investigator of the Alcohol Tax Unit.

Q. And in such official capacity were you present on June 3rd in the vicinity of the Kell Farm in Wall Township?

A. I was.

Q. Will you tell what you observed?

A. On June 3rd at about 11:45 P. M. I accompanied Investigator-in-charge Oliver J. Gettel, and Investigator Homer Casey, to the Kell Farm.

On approaching this farm we detected a very strong odor of fermenting mash. Further along the farm I heard a motor in operation. I couldn't tell whether it was electrically driven or what but it was very loud and it came from

the premises of a frame building and, with the other two investigators, Mr. Gettel and Mr. Casey, I separated from them and went to the side of the building where the noise was coming from and I came to a doorway and looking in through this door I observed a still column and a large boiler, and also a motor off to the left of the door. At the same time I observed a man bending down just to the right of the motor directly in front of me.

I arrested this man due to the fact that I had seen a violation in my presence, of a still. The still was not in operation at the time although there was a fire in the boiler, it being banked. This man was the gentleman, over on the extreme—near the window, Anthony was the man I apprehended at the time. That gentleman (indicating).

The Commissioner: What is the full name, do you know? Is that Mr. Anthony Antoniole?

[fol. 11] The Witness: That's right. At the time Investigators Gettel and Casey were outside the still building and I heard Investigator Casey call out and holler, "Hey, Van, get this fellow," and I went out there with Antoniole and found Mr. Roett, this gentleman over here (indicating) in the custody of Investigator Casey. I brought him, with Antoniole, into the still building, handcuffed. Shortly after that I heard a noise outside and Mr. Gettel was calling to someone and then he came into the building with two more men.

Mr. Calandra: Who is "he"?

The Witness: Mr. Gettel. These two men were this chap here (indicating) Pugliese, and Monticello.

The Commissioner: Which Monticello?

The Witness: Joseph Monticello. Sometime after that Mr. Casey came along with another man near the still building and brought him in and that was Sam Monticello, and I asked Sam, "How did you get here?" and he said he walked in. This same Sam Monticello—this is off the record.

Mr. Calandra: Nothing is off the record.

The Witness: I saw Sam Monticello on a previous occasion and that was on *April* 31st, driving a truck known to me as a Hill Top Dairy Products truck and I knew that aboard that truck was a load of ninety odd cans of non-tax paid alcohol.

The Commissioner: What date was that?

The Witness: The 31st day of May, at 6:35 P. M., and I asked Investigator Casey if he would call Investigator-in-charge, Mr. Gettel, at Newark, New Jersey, and inform him of the fact and also tell him that that truck would arrive in the vicinity of Newark at about 6:40 P. M.

[fol. 12] On the still premises, after Sam Monticello had entered and had been placed in custody, Investigators Dell and Fox came in and they had in their custody this chap here (indicating).

The Commissioner: Mention his name.

The Witness: I didn't arrest him and I didn't question him and I don't know his name.

The Commissioner: Can we agree who the gentleman is?

Mr. Calandra: Yes. Which one?

The Witness: This man (indicating).

Mr. Calandra: Mr. Ricciardelli.

The Witness: Mr. Riciardelli and also this gentleman (indicating) in the brown sport coat.

Mr. Calandra: Mr. Trupiano?

The Witness: That's right. They were kept with the other persons who had been apprehended.

I had searched several of the defendants and later on, accompanied by other investigators, brought them to Freehold, the Monmouth County jail, to confine them over night. That was around about two o'clock on the morning of the 4th of June.

Later on that day I came to the United States Commissioner's office and requested an arraignment for the seven persons who had been apprehended.

Q. Mr. Van De Car, let me interrupt you there. As you approached this building, what was its general description? Was it a dwelling or a farm building?

A. It was a frame building built in two heights, one lower than the other. The frame work of the building was what I would call rough lumber or sheeting, built on a cinder block foundation. It was not a home and there was no place where a man would live. It was a building apparently built for the purpose for which it was used, to house a still.

[fol. 13] Q. Was there a fence or signs posted declaring "No trepassing"?

A. There were no signs of any description.

Q. Was there a sign on the building describing these premises as a licensed distillery?

A. I observed none.
Q. Did you observe any such sign inside?
A. No.
Q. Did you observe any cans of alcohol inside?
A. Several hundred cans.
Q. Were there any stamps affixed thereto?
A. On none of them.
Q. Did any of the men that night apprehended show you a permit to operate this still?
A. None did.
Q. Was the still set up and capable of operating?
A. It was.
Q. Did any of these men indicate to you that they had any authority to operate a still?
A. They did not.
Q. Did you question any of the men you arrested?
A. Yes.
Q. Whom did you question?
A. I questioned Antoniole and I asked him several questions after Mr. Roett was apprehended.
Q. What did Mr. Antoniole say?
A. I asked him if he knew Mr. Roett and he said he didn't know him. I asked Mr. Roett the same question, if he knew Mr. Antoniole, and he said he didn't know him.
Mr. Waldron: I have nothing further.

Cross-examination.

By Mr. Calandra:

Q. Are those all of the questions that you asked Mr. Roett and Mr. Antoniole?
A. I asked him where he lived and he said Jersey City.
Q. Anything else?
A. I asked him if he was married.
Q. Yes.
A. And he said he was.
[fol. 14] Q. Yes.
A. And I asked him what his occupation was.
Q. When you say "him", who do you mean?
A. Mr. Roett. I asked him his occupation and he said he was an attorney.
Q. Continue.
A. I don't recall asking him—he asked me several questions.

Q. What were they?

A. He asked if he could talk with me and I said, "Yes, start talking."

Q. And what did he say?

A. Nothing.

Q. And that was the extent of your conversations with Mr. Roett?

A. He had a call to nature and he asked me if he could move outside of the building and I said he could and I took him out and brought him back.

Q. Did you ask him what he was doing there?

A. I didn't.

Q. You didn't. So that is about all you discussed with Mr. Roett?

A. All that I can recall.

Q. Now, with reference to Mr. Antoniole you said you asked him several questions. What were they?

A. I asked him if he knew Mr. Roett and he said he didn't.

Q. Yes. I asked him if he was married and he said he was. I asked him his occupation and he said he was a pilot and I asked him if he was in the armed forces and he said he was and I asked him when he was discharged and I believe he told me in November, with a captain's rating.

I asked him did he still do any flying and he said he did. I asked him if I saw him in the air in a yellow plane recently and he didn't answer that.

Q. You asked him if you saw him in a yellow plane recently?

A. Yes.

Q. And you say he didn't answer?

A. He didn't answer to that.

Q. Did you see him in a yellow plane?

A. I couldn't say it was he but I knew about a plane.

[fol. 15] Q. Just what do you mean by that?

A. I had information that Tony liked to fly a bit around the area.

Q. When did you get that information?

A. I had it for a week or two.

Q. Who gave it to you?

A. That is Government information and I don't care to say.

Q. Was that information given to you by an informer?

Mr. Waldron: I object. What difference does it make who told him? It is hearsay anyway

Mr. Calandra: We are going to find out a lot of things today, Mr. Waldron.

. . . . . .

The Commissioner: The objection is sustained.

Q. Now, Mr. Van De Car, confining yourself for the moment to the night of June 3rd, you say you went on the premises with Mr. Gettel and Mr. Casey.

A. That's true.

Q. Both of whom are representatives or agents of the Alcohol Tax Unit.

A. That is correct.

Q. And this was about 11:30 P. M.?

A. I would say between 11:30 and 11:45 P. M.

Q. You had no search warrant, of course?

A. None.

Q. Do you know whether Mr. Gettel or Mr. Casey or Mr. Dell or Mr. Fox, or Mr. Bennett, or any other agent of the Alcohol Tax Unit, or of any Federal agency, had a search warrant?

A. I do not know.

Q. And if a search warrant had been obtained, you would know about it?

A. I believe I would.

Q. So that your testimony is accurate that there was no search warrant.

A. As far as I know there was none.

[fol. 16] Q. Now, what time did you get to the property in question, the entire cortege?

A. About 11:45 P. M.

Q. You said before 11:30, what did you mean by that?

A. I said in my first testimony about 11:45.

Q. Very well. And who else was with you besides Mr. Gettel and Mr. Casey?

A. No one was with me.

Q. Where was this barn building situated with reference to the road which would lead you on to the property which housed this barn?

A. There is a sort of main road leading to the Kell Farm premises proper but there is a road to the right that leads down directly to the still premises.

Q. And that is the road that you went down.

A. I didn't.

Q. How did you get there?

A. I went around by the main road and crossed through a field to the side of the still premises.

Q. Were Mr. Gettel and Mr. Casey there with you?

A. They separated from me when I went through the field.

Q. That was by prearrangement that Mr. Casey and Mr. Gettel separated from you?

A. That's right.

Q. And how far off this road, this main road, would you say, was the barn building which housed the still?

A. This is a lane I would call it, or a road, leading to the farm house. The distance between the road, across the field, that would be a couple of hundred yards.

Q. And how far from the farm house was this barn building which housed the still?

A. Approximately the same distance.

Q. And you stated that this was known as the Well Farm.

A. Yes.

Q. How do you spell that?

A. Kell, K-e-l-l.

Q. And you knew, did you, that the farm premises belonged to Kell?

A. I did.

Q. When did you learn that?

[fol. 17] Mr. Waldron: I object. I didn't examine this gentleman on direct examination on that matter and I object to it on the ground that it is immaterial.

. . . . . .

The Commissioner: I will let it go in tentatively.

Mr. Waldron: This is in the nature of a fishing expedition. No materiality at all has been shown. What difference does it make who owns the farm?

Mr. Calandra: Your Honor has allowed me to continue. Let us have the question repeated.

The Commissioner: Do you say, Mr. Calandra, that the ownership of this farm is something which is directly related to the issues involved in this proceeding?

Mr. Calandra: Yes, sir, it has a considerable bearing.

. . . . . .

Mr. Waldron: May I have the question read.

(The following testimony was thereupon read by the reporter:

"Q. And you knew, did you, that the farm premises belonged to Kell? A. I did.

"When did you learn that?")

. . . . . .

(The following question was thereupon read by the reporter: "When did you learn that?")

A. A couple of weeks previous to the still seizure.

Q. That is when you learned that Kell—what is the first name——

A. I don't know.

Q. —was the owner of the farm, right?

A. That's right.

[fol. 18] Q. And you obtained that information for a purpose, didn't you?

A. Yes.

Q. What was the purpose?

Mr. Waldron: I object.

The Commissioner: I will sustain that objection.

. . . . . .

By Mr. Calandra:

Q. Mr. Van De Car, you got to this barn building on the evening of June 3rd, right?

A. The night of June 3rd.

Q. And, of course, you knew where to go?

A. Yes.

Q. Sure. You had seen that barn building on numerous occasions prior to June 3rd.

A. No.

Q. You had not? Had you been in the vicinity of the barn building prior to June 3rd?

A. Yes. Not in the immediate vicinity.

Q. How close to it were you?

A. Several miles.

Q. Did you get an odor of mash back there, two miles away?

A. No.

Q. You didn't.
A. No.
Q. And that is the closest you got to it until this night on June 3rd, several miles, two miles away.
A. Yes.
Q. And when you got to the barn building was the door closed?
A. It was open.
Q. Who opened it?
A. It was open.
Q. Who opened it?
A. I don't know.
Q. Who did you see in the building?
A. Tony.
Q. Anybody else?
A. Not another soul.

The Commissioner: That is inside the building?
The Witness: Yes, he was inside the building.

Q. Did you see anybody come out of the door before you entered it?
A. I didn't.
[fol. 19] Q. No question about that.
A. No question about that.
Q. Now, look around this courtroom and see if you don't see somebody who was in that barn building and left it prior to your entering.

(Witness looks around room.)

Q. Take your time when you are looking around.
A. I still insist I see no one in this room who I saw leave that barn building.

The Commissioner: Prior to the time you entered it.
The Witness: That's right.

Q. And this door was wide open?
A. It was.
Q. Unusual for a barn housing a still to have a wide open door, isn't it?
A. It was a pretty warm night and it was open.
Q. Somebody opened that door for you didn't they, Mr. Van De Car?
A. I don't know, I didn't see it.

Mr. Waldron: I object.

Q. And wasn't it your informer who opened the barn door?

A. Not to my knowledge.

Q. Did you see farmer Kell that night?

A. I did.

Q. Where?

A. Near his home.

Q. And where was his home with reference to the barn building?

A. About two hundred yards away.

Q. Did you have a conversation with him?

A. I didn't.

Q. Who did?

A. Mr. Gettel talked with him.

Q. Were you there when he was talking with him?

A. Yes.

Q. What did Mr. Gettel say to him and what did he say to Mr. Gettel?

A. I don't know. I wasn't close enough to hear them talk.

[fol. 20] Q. Where did the conversation take place?

Mr. Waldron: I object. There is nothing in the examination to show that this testimony is now material. Mr. Calandra is trying to void a prior ruling on your Honor's part.

The Commissioner: The objection is sustained.

Q. How long did Mr. Gettel and yourself and Mr. Casey stay with farmer Kell before you left the house building?

A. Possibly five minutes.

Q. You were in the same room with them?

A. I was in no room with them.

Q. Where did the conversation take place?

A. Outdoors.

Q. And you were standing away from them?

A. Yes, sir.

Mr. Waldron: I object.

The Commissioner: The question has been answered.

Mr. Waldron: I object to this line of questioning as not being proper cross-examination.

The Commissioner: Let's see what the next question is.

Q. So you separated from them.

A. I did.

Q. And you went directly to the barn building.
A. That's true.
Q. Did anybody tell you where to go?
A. Yes.
Q. Who?
A. Mr. Gettel.
Q. And you entered this barn building through this wide open door.
A. I did.
Q. And was that the only door in the barn that housed the still?
A. All that I saw at that time.
[fol. 21] Q. Did you see any other since?
A. Yes, later I saw another door.
Q. Was that door closed when you went there?
A. Apparently it was. I didn't see it in the dark.
Q. And when you went into the barn you made the customary observation of what was in there.
A. At a glance I saw what was in there, right in front of my face.
Q. Did you make an observation and inspect the whole building?
A. I didn't inspect the whole building at that time. At a glance I saw a still and a boiler and that was all I needed to see.
Q. And because you saw that and you saw Mr. Antoniole in there you arrested Mr. Antoniole because, you said, a crime was committed in your presence.
A. That's correct.
Q. What was Mr. Antoniole doing?
A. Bending over near a gasoline driven pump.
Q. Was the place dark?
A. No, it was illuminated by two large dry cell battery lamps.
Q. And you could see very plainly?
A. Not too plainly.
Q. You could see clearly?
A. Not too clearly but you could see outlines of objects.
Q. When did you first get information that there was a still in operation——

Mr. Waldron: I object to that, if your Honor please.
Mr. Calandra: May I finish the question?
The Commissioner: All right.

Q. When did you first get information that there was a still in operation on the Kell farm?

Mr. Waldron: I object.

The Commissioner: Objection sustained.

[fol. 22] Q. You knew, did you not, some week or ten days before when you learned that Kell owned the farm that there was something wrong going on there, did you not?

Mr. Waldron: I object. That is not the nature of this inquiry.

The Commissioner: The objection is sustained.

Q. All right. You say on the night of May 31st you observed a Hill Town Dairy truck——

A. Hill Top Dairy truck.

Q. Hill Top Dairy truck?

A. Yes.

Q. Where did you see the truck?

A. Out on Route 34, on the highway.

Q. Just where?

A. Approximately two miles from the Kell Farm.

Q. What did that truck look like?

A. I would say it was a refrigerator built type of truck. There was a door on the side and on the rear and it has "Hill Top Dairy Products" painted on the side with a number 3 on the rear and a little padlock.

Q. Did you have any information on that truck?

A. I did.

Mr. Waldron: I object.

Mr. Calandra: He testified on direct examination that he knew that the truck contained alcohol, ninety cans, he said. May I ask him about it?

The Commissioner: I think so.

Mr. Calandra: May I have the question repeated.

(The following question and answer was thereupon read by the reporter:

"Q. Did you have any information on that truck?

"A. I did.")

[fol. 23] The Witness: I had previously observed the truck.

Q. Where?

A. On highway 34.

Q. Did you ever see it go to the Kell Farm?
A. No.
Q. Did you ever see it on the Kell Farm?
A. No.
Q. What was the nature of your information—not the source.
A. The nature of the information was that the truck was being used for the illicit transportation of non-tax paid alcohol.
Q. And when did you get that information? How long prior to May 31st?

Mr. Waldron: I object. It doesn't make any difference whether he got it yesterday or the day before.

. . . . . .

"Q. And when did you get that information? How long prior to May 31st?"
A. I had it for a couple of weeks.
Q. Had you observed that truck—I will withdraw that. How many times had you observed that same truck during that couple of weeks?
A. Probably five or six times.
Q. What did you see it do?
A. Travel the highway.
Q. And that is all?
A. That's all.
Q. How did you know at 6:30 or 6:35 P. M. on the night of May 31st that this truck containing ninety cans of alcohol?

Mr. Waldron: I object.
Mr. Calandra: You asked him that question, Mr. Waldron.

. . . . . .

Mr. Calandra: May I have the question repeated.

[fol. 24] (The following question was thereupon read by the reporter:
"How did you know at 6:30 or 6:35 P. M. on the night of May 31st that this truck contained ninety cans of alcohol?")

A. I received the information from a reliable source.
Q. How reliable?
A. Absolutely the best.

Q. I can imagine. Did you also have information at that time as to where this alcohol was being manufactured? Meaning now, the night of May 31st, 1946.

A. I had that information.

Q. Yes, and you knew then that it was coming from the Kell Farm, didn't you?

A. Yes.

Q. You did. And you had known that alcohol was being manufactured on the Kell Farm for some time prior to May 31, 1946, didn't you?

Mr. Waldron: That is not in issue here.

The Commissioner: Are you objecting to it?

Mr. Waldron: Yes, sir.

The Commissioner: I will sustain that objection.

Mr. Calandra: Very well.

Q. Now, Mr. Van De Car, if I am incorrect in my statement I want you to correct me but I understand by your testimony now that on June 3, 1946, sometime around 11:30 P. M., or shortly thereafter, you went on this Kell Farm for the first time.

A. That is correct.

Q. That you stopped and that somebody, Mr. Gettel and Mr. Casey, had a conversation with farmer Kell.

A. That is correct.

Q. That pursuant to the direction of Mr. Gettel you went directly to the barn, he pointed it out to you or told you where you would find it.

A. Find what?

Q. The barn.

A. That's right.

[fol. 25] Q. And he told you there was a still in there, right?

A. He didn't tell me that.

Q. What did he tell you?

A. He told me to go to that building and he pointed it out to me.

Q. For what?

A. Evidently that was where the odor of mash was emanating from.

Q. Well, he gave you a reason to go to the barn, didn't he?

A. Naturally.

Q. What was it?

A. To see what was in the barn.
Q. And when you got there this door was wide open?
A. That's correct.
Q. And you saw nobody come out?
A. That's correct.
Q. And in there you saw Antoniole?
A. Yes.
Q. Working with dim lights around something in there.
A. That's correct.
Q. Is he the only person whom you saw committing any of the violations which you charged in these complaints, and you are the complaining witness?
A. No.
Q. Who, of the others, did you see do anything that violated the laws of the United States which caused you to charge them, in so many counts, with these violations?
A. Sam Monticello.
Q. What did he do?
A. Driving the Hill Top Dairy truck.
Q. When?
A. On the 31st day of May.
Q. Did you see the alcohol load in the truck?
A. I didn't.
Q. Did you see the alcohol in that truck at all?
A. No, sir.
Q. From the time you first observed it on the highway.
A. No, sir.
Q. Your information then was merely what somebody told you, that there were ninety cans of alcohol on there.
A. Reliable information.
[fol. 26] Q. And was that all that you observed Sam Monticello do with reference to each one of these counts that you charge against him in this complaint which you signed before his Honor, on June 4th? Specifically, the first count, that he did, in violation of 27 USC 203, engage in the business of distilling distilled spirits, without a basic permit as herein prescribed; and on the

Second Count, that he did, in violation of Sec. 2900 (a) of the Internal Revenue Code, fail to pay the tax on distilled spirits, distilled as aforesaid; and on the

Third Count, that he did, in violation of Sec. 2803(a) of the Internal Revenue Code, possess distilled spirits, the immediate containers of which did not have affixed thereto the requisite stamp; and on the

Fourth Count, that he did, in violation of Sec. 2810(a) of the Internal Revenue Code, have in his possession and custody, and under his control, a still and distilling apparatus set up, which was not duly registered with the collector of the district in which it is; and on the.

Fifth Count, that he did, in violation of Sec. 2812(a) of the Internal Revenue Code, engage in the business of a distiller without giving the notice required by said subsection; and on the

Sixth Count, that he did, in violation of Sec. 2814(a) of the Internal Revenue Code, engage in the business of a distiller without giving the notice prescribed by said subsection, and without executing a bond prescribed therein; and on the

Seventh Count, that he did, in violation of Sec. 2833(a) of the Internal Revenue Code, engage in and carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him; and on the

Eighth Count, that he did, on May 31, 1946, in violation of Sec. 2803(a) of the Internal Revenue Code, transport distilled spirits, the immediate containers of which did not [fol. 27] have affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed on such spirits; and on the

Ninth Count, that he did, on May 31, 1946, in violation of Sec. 2913 of the Internal Revenue Code, remove distilled spirits on which the tax had not been paid, to a place other than the internal revenue bonded warehouse provided by law.

Mr. Waldron: I object.

Mr. Calandra: He is making the complaint.

Mr. Waldron: The complaining witness need not of his own knowledge know of the violation provided he has reasonable grounds to believe.

The Commissioner: Is there any dispute about that?

Mr. Calandra: I asked him a very pertinent question. He is the complaining witness and I ask him now what he knows about Sam Monticello.

Mr. Waldron: And he answered you previously.

Mr. Calandra: And I want to know if that is all that he knows about Monticello and I have a right to ask that. He is the accuser against this man.

The Commissioner: I think that is proper. I think it is proper to ask this witness questions which are directed to his knowledge of the facts set forth in the complaint. It is quite true that you might be able to supply testimony of other witnesses but counsel has a right to ask this witness on cross examination whether he knows of other acts relating to this defendant. If he does, let him tell us and if he doesn't, he can say so. I don't see any objection to that. Let's have the question repeated.

(The following question was thereupon read by the reporter: "Q. Was that all that you observed Sam Monti-[fol. 28] cello do with reference to each one of these counts that you charge against him in this complaint which you signed before his Honor on June 4th").

A. It was not all.

Q. What else did you see Sam Monticello do that caused you to make this complaint?

A. I saw him as he came out of the wooded area right in the immediate vicinity of the open still.

Q. When?

A. On the morning of June 1st—that is, June 4th, early in the morning.

Q. Where were you?

A. Standing in the doorway with Tony in custody.

Q. On June 1st?

A. On June 4th.

Q. That morning?

A. Yes, very early that morning.

Q. And you were standing in the doorway of the building that housed the still. What was he doing?

A. I heard him talking.

Q. You say you heard him talking?

A. Yes.

Q. What did you hear him say?

A. He said "Me, me." because he was asked a question by Antoniole.

Q. And what did Antoniole say?

A. Nothing.

Q. Could you see the still or any illicit equipment from the open door of the barn on that morning? This is daylight.

A. No, it was still in darkness.

Q. Early in the morning?

A. Yes.

Q. What time?

A. About a quarter to two or half-past one.

Q. Where were you?

A. Right there at the still.

Q. And this was hours before the raid was made.

A. No, the raid—the still was seized on the night of the third, at 11:45 P. M.

Q. And this was the morning of the first.

A. No, the morning of the fourth. I said that. That comes after three, four comes after three, not one.

[fol. 29] Q. That's right. You knew then, did you not Mr. Van De Car, that there was a still in the barn.

A. Sure, we seized it.

Q. What town was this farm and still located in?

A. Wall Township.

Q. How far is that from Commissioner Goldstein's office here in Asbury Park?

A. Probably fifteen miles; probably. I don't know the exact distance.

Q. Who else was with you?

A. Mr. Gettel and Mr. Casey.

Q. And they saw the same thing you did?

A. After I did.

Q. And they were right there.

A. After I had been in the place they came in.

Q. We are talking now about the morning of June 1st——

The Commissioner: June 4th. Let's get it straight.

The Witness: June 4th.

The Commissioner: That is the date he testified to.

Q. Let's go back to the first of June. Did you say something about the 1st of June or the morning of the fourth?

A. Nothing about the first.

Q. The morning of what?

A. The 4th of June.

Q. The 4th of June?

A. Yes.

Q. Was this after or before the raid?

A. After. The raid was the night of the 3rd of June, approximately 11:45.

Mr. Waldron: I object to this as being repetitious. It serves no useful purpose.

The Commissioner: I do think, Mr. Calandra, I don't want to cut you short or deprive you of a rather wide lati- [fol. 30] tude of examination at this hearing but I would ask you to bear in mind the essential and peculiar nature of a preliminary hearing and try to handle your cross examination so that there will be no unnecessary repetition.

Mr. Calandra: Yes, sir.

Q. Before June 3, 1943 did you see Sam Monticello at the Kell Farm?

A. I did not.

Q. At no time?

A. No, sir, I was never there before.

Q. Before June 3rd, did you see Antoniole at the Kell Farm?

A. No, I did not.

Q. And when I say the Kell Farm with reference to these two men I am referring to the barn building housing the still.

A. That's right.

Q. All right. Did you see Pugliese at the barn building which housed the still prior to the night of the raid?

A. I did not.

Q. Did you see Joseph Monticello there?

A. I did not.

Q. Did you see Mr. Trupiano?

A. I didn't.

Q. Did you see Mr. Roett prior to the night of the raid?

A. I did not.

Q. Did you see Mr. Ricciardelli there prior to the night of the raid?

A. No.

Q. At no time?

A. No.

Q. Now, did you talk with any of the other defendants, aside from Mr. Roett and Mr. Antoniole?

A. I talked to Sam.

Q. What did he say to you and what did you say to him?

A. I asked him how he got there and he said he walked in.

Q. And that was all?

A. That's all.

Q. That was the extent of your conversation with him?

A. That's right.

[fol. 31] Q. Did you talk to Pugliese?

A. Only that he said he was a little bit cold and I said I was sorry but I had nothing to warm him up with.

Q. And did you talk to Ricciardelli?

A. No, I didn't, not at all.

Q. And with Joseph Monticello, did you talk to him?

A. He said he was cold and I said, "Casey, give him your coat," and he gave him his coat.

Q. Did he say anything to you?

A. No.

Q. Did any of the men say anything as to what they were doing there?

A. No.

Mr. Calandra: Now I want to make him my witness. I am through with my cross examination.

* * * * * * *

William A. Van De Car, was thereupon called as a witness on behalf of the Defendants.

Q. Mr. Van De Car, when did you first learn that there was a still on the Kell Farm?

Mr. Waldron: I object to that as being immaterial. It doesn't make any difference on what farm the still is.

Mr. Calandra: This is my case.

Mr. Waldron: And I am objecting.

* * * * * * *

"Q. Mr. Van De Car, when did you first learn that there was a still on the Kell Farm?")

Mr. Calandra: He charges these men with a still, Commissioner, and that goes right to the gravamen of the complaint.

The Commissioner: I will allow the question to be answered. Answer the question.

The Witness: A couple of weeks previous to the raid.

[fol. 32] Q. You received that information. Was that from a very reliable source?

A. It was.

Mr. Waldron: I object. He is now testifying to hearsay.

The Commissioner: I will overrule the objection as coming too late and, further, that the question is proper.

Q. Who did you tell this information to?
A. I didn't tell it to anyone, it was told to me.
Q. Did you tell it to your superiors?
A. He knew about it.
Q. Who is "he"?
A. Mr. Gettel.
Q. Mr. Gettel knew two weeks prior to the day of the raid that there was a still in this barn on the Kell Farm, right?
A. I believe so.
Q. Did you ever talk to Kell about it?
A. Never.
Q. You knew Kell?
A. I saw him once.
Q. You knew it was his farm, right?
A. That's true.
Q. Why didn't you lock him up for permitting a violation of the Internal Revenue laws to be committed on his premises?

Mr. Waldron: I object.
The Commissioner: Objection sustained.

Q. Did Kell have a permit, a license or authority to operate a still on that farm?

Mr. Waldron: I object.
The Commissioner: Objection sustained.

Q. Was Kell arrested in this case?

Mr. Waldron: The same objection.
The Commissioner: Objection sustained.
[fol. 33] Q. Will he be arrested in this case?

Mr. Waldron: I object.
The Commissioner: Sustained.

Q. This information that you received from this very reliable source that there was a still on the Kell Farm, was revealed by you completely as you got it reported to you to Mr. Gettel?
A. No.
Q. Who else did you tell it to besides Mr. Gettel?

Mr. Waldron: I object to that as putting words in the witness' mouth.

Mr. Calandra: He said he spoke to Mr. Gettel. I will withdraw that.

Q. You say Mr. Gettel already knew there was a still on that property, is that right?

A. I believe he did.

Q. Well, did you talk to him about it?

A. He talked to me about it.

Q. And he told you he knew that there was a still on this property?

A. I don't recall that he said he absolutely knew there was. He talked to me about it.

Q. Well, what did he say to you about it?

A. He believed there was a still in on this property, that's all he told me.

Q. Did you ask him the source of this information?

A. I didn't.

Q. Did he ask you to do anything with reference to his belief that there was a still on this farm?

A. Yes.

Q. What did he ask you to do?

A. To go to work on it.

Q. And what did that mean to you?

A. An observation and investigation.

Q. And from that time on you made observations to determine if there was a still there and how many people were connected with it.

A. That's true.

[fol. 34] Q. And during all of this time you made these observations?

A. Yes.

Q. And when was it first confirmed to you that there was a still on the property?

A. On the night of the 3rd, 11:45, when I actually saw it, that was confirmation.

Q. You didn't believe Mr. Gettel when he told you he believed there was a still there?

A. Yes, sir.

Q. You did believe him?

A. Yes.

Mr. Calandra: All right, that is all.

Mr. Waldron: I have nothing further.

The Commissioner: Call your next witness.

BERTHOLD O. NILSON, being first duly sworn in behalf of the Government, testified as follows:

Direct examination.

By Mr. Waldron:

Q. Mr. Nilson, what is your official capacity?

A. I am an investigator of the Alcohol Tax Unit.

Q. And in such capacity were you present on the Kell Farm, Wall Township, on May 31, 1946?

A. I was.

Q. Did you observe the defendant, Samuel Monticello, on that evening?

A. I did.

Q. Tell us what you observed.

A. Why, Mr. Monticello came to the farm, the barn, with the Hill Top Dairy truck and I assisted Mr. Monticello in loading five gallon cans of alcohol. After loading the alcohol Mr. Monticello again drove the Hill Top Dairy truck away from the farm.

Q. Will you point out Mr. Monticello, please. (Witness indicates a gentleman present.)

The Commissioner: Let the record indicate that the witness pointed to Samuel Monticello, one of the defendants in this case.

[fol. 35] Q. On the evening of June 3rd were you present at the Kell Farm?

A. I was.

Q. What part of the Kell Farm?

A. I was at the barn housing the still.

Q. Tell us what you observed and who you observed at that time.

Mr. Calandra: Can you fix the hour, please.

Q. The evening of June 3rd, approximately 11:15.

A. At 11:15 on June 3rd I was in the barn with Antoniole.

Q. Point him out, please.

(Witness indicates gentleman in room.)

A. This gentleman sitting here.

The Commissioner: Indicating the defendant Antoniole in this proceeding.

A. About 11:20 I left the barn and went through the door and sat on a concrete block adjacent to the door in front of the barn. I sat there for a few moments. At about 11:30 to 11:45 I saw a man come around the far corner of the barn. This man didn't see me. I waited until this man reached the door that was open at the time. With the outline of the man in the door I recognized him as one of our investigators. As soon as this man——

Mr. Calandra: His name, please.

The Witness: Investigator Van De Car. After this man had entered the barn I arose from my seat and went over the fence adjacent to the barn that lead to the cow yard and proceeded on up the hill. While going up the hill I met Investigator-in-charge Gettel and Investigator Casey. I identified myself to these men and proceeded to the farm house.

[fol. 36] Q. Previous to 11:15, early in the evening of June 3rd, did you observe anyone else on the stil- premises?

A. I did.

Q. Name them and indicate them, please.

A. I saw Roett and Mr. Trupiano and Mr. Ricciardelli and Mr. Antoniole.

Mr. Calandra: What time was that, please?

Q. Approximately what was the time of the observation?

A. I would say about 5 P. M.

Q. About 5:00. And what were these men doing?

Mr. Calandra: Each one, specifically.

A. Mr. Trupiano was doing the cooking. Mr. Ricciardelli was tending the furnace. Mr. Antoniole was assisting in general. He assisted in filling cans and he was assisted in that operation by Mr. Roett.

Q. Prior to the time did you observe any other men participating in the operation of this illicit still?

A. Prior to what time?

Mr. Calandra: June 3rd.

The Witness: I did, sir.

Mr. Waldron: I move to strike that question, sir——

Mr. Calandra: I object to that. He asked the question and the witness answered it. By what right can he move to strike?

The Commissioner: It was not answered.

Mr. Calandra: Yes, it was.

The Commissioner: If the question has been answered I don't think you have a right to withdraw the question, or rather to move to strike it out.

Q. Who else did you observe and the approximate time and date.

A. And date?

[fol. 37] Q. Strike that out, please. Did you observe Frank Pugliese in the vicinity of the still premises?

A. Not prior to June 3rd.

Q. Not prior to June 3rd?

A. Not prior to June 3rd.

Q. When did you observe Mr. Pugliese?

A. I observed Mr. Pugliese after the raid. I returned to the barn and observed the defendants through several holes, from outside of the barn.

Q. Where was Mr. Pugliese?

A. Mr. Pugliese, when I saw him, was with the group of defendants that had been apprehended and they were in front of the alcohol receiving tank in the barn.

Q. And did you observe Joseph Monticello?

A. I observed Joseph Monticello at that time also.

The Commissioner: But this was after the raid.

The Witness: Yes, sir, this was after the raid.

Q. Did you observe Monticello prior thereto?

Mr. Calendra: Which one?

Mr. Waldron: Joseph.

A. I did, sir.

Q. What time and where?

A. At approximately—I don't have the notes to make this very definite now——

Q. Approximately, sir.

A. I should say the day of June 3rd, approximately, the day of June 3rd, about 1 P. M. That is approximately.

Q. What was he doing?

A. He arrived at the still premises in an automobile, a green automobile, in which he brought yeast and booster.

Q. What do you mean by "booster"?

A. Booster is a product known by that name to the trade and its purpose is to aid fermentation.

Mr. Waldron: That is all.

[fol. 38] Cross-examination.

By Mr. Calandra:

Q. Mr. Nilson, you say you are an investigator of the Alcohol Tax Unit?

A. That is correct, sir.

Q. And how long have you been such investigator?

A. Approximately two years.

Q. Two years?

A. Yes.

Q. And how long have you been assigned to New Jersey?

A. I have been in New Jersey since the start of my employment as investigator of the Alcohol Tax Unit.

Q. And you are connected with the Newark office?

A. I am connected with the Newark office, yes, sir.

Q. And you say that on the afternoon of June 3rd, at about 1:00 P. M., you saw Joseph Monticello arrive at the premises in question and make a delivery of yeast and booster?

A. That is correct, sir.

Q. And did he immediately leave after he deposited these materials there?

A. He did, sir.

Q. He did. Who did he deliver them to?

A. They were not delivered to anyone in particular. They were delivered to the still house.

Q. They were delivered to the still house and left there?

A. Yes.

Q. And you were in there, of course, at the time.

A. Yes, sir.

Q. And who else was in there with you?

A. Mr. Trupiano, Mr. Ricciardelli, Mr. Roett and Mr. Antoniole.

Q. Now, please tell us what each one of these gentlemen were doing in there at the time when this booster and yeast was delivered by Joseph Monticello? Instead of saying "they", name each one individually and tell us what he was doing.

A. Mr. Trupiano was cooking. Mr. Ricciardelli was tending the furnace. Mr. Antoniole and Mr. Roett were assisting in general. That is, it is difficult to say exactly what they were doing but they were assisting in the filling of the cans [fol. 39] and getting down the empty cans prior to fil-ing them, and so forth.

Q. What were you doing in there?

A. I was assisting in general. I wasn't doing anything specific at the particular time, if I recall, I brought some empty cans from the pile over to be filled and I was taking some of the filled cans and putting them on the pile.

Q. And this was on June 3rd?

A. Yes.

Q. In the afternoon?

A. That is right.

Q. And you remained in the barn building all the time, the building that housed the still?

A. Except to go to the farm house for supper and later on, if I recall, I returned to the farm house for a package of cigarettes.

Q. And when did you return to the barn again, how long prior to 11:30 or 11:15?

A. Oh, I was there at about 10:00 P. M.

Q. And what did you go there for?

A. We were at that time waiting for a load of sugar to arrive.

Q. And who is "we"?

A. Antoniole and Mr. Roett.

Q. And this load of sugar was scheduled to arrive at 10:00 P. M.?

A. The load of sugar was scheduled to arrive that evening.

Q. Did it arrive?

A. No, sir.

Q. When did you first see Mr. Gettel and Mr. Van De Car and Mr. Dell and Mr. Fox and Mr. Casey that day?

A. At approximately 11:45 I saw Investigator-in-charge Gettel and Investigator Casey.

Q. Where?

A. They were coming down over the hill to the adjacent cow barn as I was going up the hill.

Q. And you knew they were coming?

A. Yes, sir.

Q. When did you know they were coming?

Mr. Waldron: I object to that as being immaterial, when he knew they were coming.

[fol. 40] Q. When did you first know they were coming at that hour?

Mr. Wildron: I object.
The Commissioner: I will permit that question.

A. I didn't know exactly what time those investigators were coming.
Q. But you knew they were going to be there that night, didn't you Mr. Nilson?
A. That I did, sir.
Q. And by what manner or means did you get that information?

Mr. Waldron: I object.
The Commissioner: I think it is improper.
Mr. Calandra: I will withdraw the question.

Q. When did you first know they were coming that night?
A. At about 10:00 P. M.
Q. How did you get the information?

Mr. Waldron: I object.
The Commissioner: Objection sustained.

Q. But you knew they were coming in the night time, did you not?

Mr. Waldron: I object.
The Commissioner: Objection sustained.
Mr. Calandra: I pray an exception, if your Honor please. I am entitled to know when he knew they were coming.
The Commissioner: I think he answered the question.
Mr. Waldron: Yes, he said approximately ten o'clock, he knew.
[fol. 41] The Commissioner: Yes, I thought he answered the question and that is the reason I sustained the objection.
Mr. Calandra: All right.

Q. Was it by prearrangement——

Mr. Waldron: I object.
Mr. Calandra: You don't know what I was going to ask. May I finish, please?

Q. Was it by prearrangement with Mr. Van De Car that at about ten o'clock that night you were to walk outside the barn building that housed the still and leave the door conveniently open for Mr. Van De Car, and just sit by the concrete rock? Was that prearranged?

Mr. Waldron: I object.

The Commissioner: On what grounds do you object?

Mr. Waldron: It is not material whether it was prearranged or whether it was accidental.

The Commissioner: What have you to say about that, Mr. Calandra?

Mr. Calandra: It is very pertinent. Here is a violation of law that is certainly not open to the public. It is obvious there was no breaking in by Agent Van De Car. The door was conveniently left open and he sat on this concrete rock at the doorway, and when he saw Van De Car come up and when he got close to the doorway he knew it was Van De Car, and he was very careful to say that he looked and recognized it was an agent——

The Commissioner: I will allow it over the objection. Let us have the question again.

[fol. 42] (The following question was thereupon read by the reporter:

"Q. Was it by prearrangement with Mr. Van De Car that at about ten o'clock that night you were to walk outside the barn building that housed the still and leave the door conveniently open for Mr. Van De Car, and just sit by the concrete rock? Was that prearranged?")

A. No, sir, it was not.

Q. Why did you leave the door open?

A. I didn't open the door, sir.

Q. Who opened the door? I will withdraw that.

Q. How did you get out of the barn building at ten o'clock through the open door? Was the door always left open?

A. That it was, sir.

Q. There is no question about it.

A. No, sir.

Q. Why were you sitting on the concrete rock at ten o'clock outside this open door?

A. I don't recall saying I sat outside at ten o'clock.

Q. Well, you sat on the rock until the time came for Mr. Van De Car to arrive. Why did you sit out there?

Mr. Waldron: I object. It hasn't been established that there was an arrangement with Mr. Van De Car to arrive.

The Commissioner: I think it is a proper question and I will allow it. The question is why he sat out there. He said there was no prearrangement and he said he sat there and

whatever the reason was why he sat out there, I think he can answer the question and I don't see any harm in his doing so. I will overrule the objection.

A. I sat outside just to get a breath of fresh air.

Q. How long were you sitting out there for that breath of fresh air?

A. Approximately ten minutes.

[fol. 43] Q. And it was then that Mr. Van De Car arrived, right?

A. Yes, sir.

Q. And when he arrived you immediately went away.

A. Yes, sir.

Q. And you went on over the hill.

A. Yes, sir.

Q. And did you know you were going to meet Mr. Gettel and Mr. Casey up over the hill?

A. No, sir.

Q. Did you know where you were going to meet them at all?

A. No, sir.

Q. But you knew they were going to be there, didn't you?

A. Yes, sir.

Q. You did.

A. Yes, sir.

Q. And you learned that for the first time on June 3rd, that they would be there that night.

A. Yes, sir.

Q. And you said you identified yourself to Mr. Casey and Mr. Gettel.

A. Yes, sir.

Q. Why did you do that? Mr. Gettel was your superior, wasn't he?

A. Yes, sir.

Q. Why did you have to identify yourself to him?

A. Coming up the hill I ran into these two men and I surmised at that time that they were Mr. Gettel and Mr. Casey.

Q. And that was because you knew they were going to meet you.

A. There was no prearranged meeting place at that time.

Q. Is that your customary way of departing from this barn, by going up over the hill? Was that in the direction

of the farm house where you were supposed to be eating and living?

A. Yes, sir.

Q. That was your customary way of going?

A. Yes, sir.

Q. And did you report that to Mr. Casey and to Mr. Gettel, that that was your customary way of leaving the barn building when you were through with your daily toil in the still?

A. No, sir.

[fol. 44]. Q. You didn't tell them that?

A. No.

Q. So it was just by coincidence or accident that you met them over the hill, is that right?

A. It was coincidental that they met me at that particular spot, yes.

Q. And this hill is in the opposite direction from where this farm building was, where your cousin Kell was living.

Mr. Waldron: I object. This is cross examination and it must be limited to the direct examination.

Mr. Calandra: He said he ate at the farm house.

The Witness: I don't recall saying that.

Mr. Waldron: Who this cousin is has not been established by the direct examination.

The Commissioner: Is there an objection?

Mr. Waldron: Yes, sir.

The Commissioner: I will sustain the objection.

Q. Do you know Kell?

A. Yes, sir.

Q. How long did you know Kell?

A. Approximately four months.

Q. And Kell is the owner of the farm, isn't he?

A. Yes, sir.

Q. And Kell introduced you to these men as his cousin, didn't he?

A. Some of these men. As his wife's cousin.

Q. As his wife's cousin?

A. Yes.

Q. And when was the introduction made and whom did you meet at that introduction and where?

A. That introduction was made approximately three and a half months prior to the actual raid.

Q. Where was the introduction made?

A. At the Kell Farm.

Q. Did Kell know that you were an investigator of the Alcohol Tax Unit at that time?

[fol. 45] Mr. Waldron: I object.

The Commissioner: The objection is sustained.

Q. Who did Kell introduce you to?

A. Mr. Roett——

Q. Yes.

A. Mr.——

Q. From the very first time that you met anybody allegedly connected with this case, Mr. Nilson.

A. Mr. Trupiano, Mr. Ricciardelli.

Q. When did you first know that a still was going to be erected on this property?

Mr. Waldron: I object, if your Honor please. That is not in issue.

The Commissioner: What difference does it make, Mr. Calandra?

Mr. Calandra: A lot of difference.

. . . . . .

Q. Let me ask this question. Among all of these accused defendants who did you meet first?

A. Mr. Roett.

Q. Where?

A. At the Kell Farm.

Q. When?

A. Do you mean when I was first formally introduced to Mr. Roett?

Q. Yes, that is what we are talking about?

A. About three and a half months prior to the raid.

Q. Was there a still in the barn then when you first met Mr. Roett?

A. No, sir.

Q. Who introduced you to Mr. Roett?

A. No one, formally.

Q. How did you meet him?

A. I was in his presence.

Q. Where?

A. At the Kell Farm.

Q. Who else was present?

A. Mr. Trupiano.

Q. As of when are you talking about now? You answered the question a moment ago when I asked you who was the [fol. 46] first man that you met and you said Mr. Roett.

A. That is correct.

Q. Was he alone?

A. No, sir.

Q. All right, who else was with him?

A. Mr. Trupiano.

Q. Yes.

A. Mr. Ricciardelli.

Q. Was there a still in the barn then?

A. No, sir.

Q. Was there a barn on the premises then?

A. No, sir.

Q. What conversations did you have with Mr. Trupiano and Mr. Roett? By the way, were those the only persons who were present at the very first meeting?

A. No, sir.

Q. Who else was present?

A. Mr. Kell.

Q. That's all?

A. That's all.

Q. What was the conversation about?

Mr. Waldron: I object unless he shows how this is material.

Mr. Calandra: He is going to tell you that.

The Commissioner: I think this is proper cross examination. I will allow it.

Q. What was the conversation about?

A. The conversation was about the erection of a building and the setting up of a distillery on the Kell property.

Q. Who was that conversation held with?

A. That conversation was between Mr. Roett and Mr. Kell.

Q. And you participated in that conversation?

A. No, sir.

Q. Did Trupiano participate in the conversation?

A. Yes, sir.

Q. What did he say?

A. I don't recall exactly what Mr. Trupiano said at that conversation.

Q. What did Mr. Roett say?

A. I also cannot clearly recall or quote him as to what he said to Mr. Kell at that time.

[fol. 47] Q. You don't remember. Did you make any notes of it?

A. Yes, sir.

Q. You don't have them here?

A. No, sir.

Q. Did you make up a report on this case? If one of the agents have a copy of the report here you may have my permission to use that report to refresh your recollection.

Mr. Waldron: I object and I suggest that you ask the gist of the conversation.

Mr. Calandra: I don't know what it was. He was there.

* * * * * * *

(The following question was thereupon read by the reporter: "Q. Did you make up a report on this case?")

A. No, sir.

Q. You have made no report up yet?

A. No, sir.

Q. You are required to, aren't you?

Mr. Waldron: I object.

The Commissioner: Objection sustained.

Q. Do you now ask the assistance or aid of any of the agents here to whom you furnished this information, relating to the notes you made, to give them to you so that you may testify under oath? I want to give you all the opportunity in the world to get the proper information here.

Mr. Waldron: We represent to you now that no report is in our hands from which this gentleman can testify to the facts required by defendants' counsel.

Mr. Calandra: There are six or seven agents here in this room and they undoubtedly know about it.

Mr. Waldron: If Mr. Calandra believes these agents have that information he is at liberty to put them on and ask them.

[fol. 48] Mr. Calandra: I may do that, too.

The Commissioner: Do you know whether or not any of the agents of the Alcohol Tax Unit, or whether the Assistant United States Attorney has the notes or memoranda which you made in connection with these conversations?

The Witness: No one has those notes outside of myself.

By Mr. Calandra:

Q. Where are they?

A. They are in my personal possession.

Q In your personal possession?

A. That is, I don't have them on my person but they are in my own locker, shall we say.

Q. All right. When you had this first meeting three and a half months ago, did the conversation relate to the erection of the barn, and the well, and that it was to house a still?

A. I didn't mention a well, sir. However, it was incorporated.

Q. And did you relay that information immediately to Mr. Gettel, your superior?

Mr. Waldron: I object.

Mr. Calandra: It calls for a yes or no answer.

The Commissioner: I will sustain it.

Q. Did you report that information to anybody?

Mr. Waldron: I object.

The Commissioner: Sustained.

Q. What were you doing at this farm on that very first day when Mr. Roett and Mr. Trupiano came there?

A. If I recall clearly, I was assisting Mr. Kell in some farm operation.

[fol. 49] Q. You were working on the farm there prior to the first meeting three and a half months ago?

A. Yes, sir.

Q. You were?

A. Yes, sir.

Q. What kind of work were you doing there?

A. Prior to the first meeting with Mr. Roett and Mr. Trupiano and Mr. Ricciardelli I was engaged in farm operations.

Q. Working for Mr. Kell?

(Witness does not answer.)

Q. You ought to know whether you were working for Mr. Kell or not, prior to that time, Mr. Nilson.

Mr. Waldron: I insist that the same courtesy that was extended to the first witness be extended to this gentleman, if your Honor please.

Mr. Calandra: He is a Government investigator and this is not so long ago. He is an experienced investigator and he can answer that question.

The Commissioner: I will overrule the objection because I feel, as the cross-examination has developed to this point, I feel that the question that has just been asked has a very direct and logical relationship to what has been testified to just previously. Will you answer the question, please.

A. At that time I was employed as an investigator for the Alcohol Tax Unit.

Q. Then you were not working for Kell?

A. Only under pretense.

Q. And who gave you the authority to work for Mr. Kell under pretense?

Mr. Waldron: I object to that as being immaterial.

Mr. Calandra: He is a Government investigator.

Mr. Waldron: That is the answer.

[fol. 50] The Commissioner: I will overrule the objection. I think the question is proper.

Q. Who gave you the authority?

A. I was given the assignment by Investigator-in-charge Gettel.

Q. Yes, and the reason for that was that you, as a result of conversations which you heard and participated in, between Kell, Roett, Trupiano and another, you knew that the still was going to be set into the barn that was to be erected on the premises, didn't you, all of which you reported to Mr. Gettel, is that right?

A. Yes, sir.

Q. Sure, and that was the pretense of your farm employment, correct?

A. Yes, sir.

Q. All right. And therefore, each time that you met and spoke with any of these defendants against whom you have testified, you reported everything that was transpiring, their activities and what you yourself were doing, did you not?

A. At different periods, yes, sir.

Q. Yes, and as the barn went up, you reported that, right?

A. Yes, sir.

Q. And as the road was made, you reported that, right?

A. Yes, sir.

Q. And as the still equipment went in you reported that, right?

A. Yes, sir.

Q. All of which you reported to your superior, Mr. Gettel, is that right?

A. Yes, sir.

Q. And when the still started to operate you reported that, didn't you?

A. Yes, sir.

Q. When did it start to operate?

A. Approximately three weeks prior to the actual raid.

Q. Why didn't you then arrest each and every one of the men connected with that still operation?

Mr. Waldron: I object. The question has no materiality. Mr. Calandra seeks to charge this gentleman with a duty not imposed upon him by law. He is acting under instructions of higher authority.

[fol. 51] Mr. Calandra: Then let him say so, if that is the proposition.

The Commissioner: The question is, why he didn't arrest them?

Mr. Calandra: That is correct. He is participating in an offense. He is a Federal officer, acting under authority or orders, but he is participating in defrauding the Government of taxes and that is the gravamen of these charges and by his own answer he says this still was in operation for three weeks before anything happened.

The Commissioner: Is it your idea that it is this officer's duty to arrest?

Mr. Calandra: It is every officer's duty to arrest anyone who commits a crime in his presence and Mr. Van De Car was very careful to testify, by comparison, that when he saw this still in that barn—that he walked in and saw Antoniole fooling around with something in there and he placed him under arrest because, he said, a crime was being committed in his presence.

The Commissioner: I will overrule the objection.

Mr. Calandra: May I have the question repeated.

(The following question was thereupon read by the reporter:

"Q. Why didn't you then arrest each and every one of the men connected with that still operation?"

A. I had no instructions from my superiors to that effect.

Q. Well, a crime was being committed in your presence, wasn't it?

The Commissioner: I think this would be a good time to take a noon recess.

(Hearing adjourned from 12:30 P.M. until 1:30 P.M.)

[fol. 52] Hearing resumed.

Cross-examination.

By Mr. Calandra (continued):

(The following question was thereupon read by the reporter:

"Q. Well, a crime was being committed in your presence, wasn't it?"

A. Yes.

Q. And you were a Federal agent on that day.

A. Yes, sir.

Q. And during all the times from three and a half months ago when you first met Mr. Roett, and the others, and Kell, you continued to be a Federal agent.

A. Yes.

Q. And on the Federal payroll.

A. Yes.

Q. And you were not on leave during this period of time we are speaking of, during this three and a half or four months.

A. No, sir.

Q. Now, you were in the barn each day the still was in operation?

A. Yes, sir.

Q. And what were your duties, what was your work?

A. My duties were the unloading and the loading of the trucks, dumping and mixing sugar, and adding yeast and booster in order to make the mash.

Q. You were what was commonly known as a mash man.

A. That's right.

Q. And how many hours a day did you work?

A. The hours varied. I would start some mornings very early, start the fire and get the steam up, and sometimes I would have a few hours out in the morning and then return back and continue on until various hours in the evening.

Q. When you were out the few hours in the morning those were the hours you would confer with your co-agents and give them the information as to what was going on?

A. No, sir.

[fol. 53] Q. That was your leisure time?

A. That is correct.

Q. How frequently did you report the activities of each of the men who were at the still, to your superior?

Mr. Waldron: I object to this general line, we are going very far afield.

The Commissioner: I think so too.

Mr. Calandra: I will withdraw the question.

Q. Did you during the three and a half week period that you confined yourself to working in or at the still, making mash and filling cans and starting up the furnace, did you take samples of mash and alcohol?

A. Yes, sir.

Mr. Waldron: I object because it has not been brought out on direct examination. If he wants to make him his witness I have no objection.

Mr. Calandra: And his answer is "Yes, sir".

The Commissioner: Let us have the question and answer repeated.

(The following question and answer was thereupon read by the reporter):

"Q. Did you during the three and a half week period that you confined yourself to working in or at the still making mash and filling cans and starting up the furnace, did you take samples of mash and alcohol?

"A. Yes, sir."

Q. You took samples out of mash and alcohol, right?

A. I took samples of the alcohol.

Q. Not of mash?

A. Not of mash.

Q. And what did you do with the samples?

A. I retained them in my possession until I was able to turn them over to the Investigator-in-charge.

[fol. 54] Q. And when did you turn them over to the Investigator-in-charge and what is his name, please.

A. I turned them over to Investigator-in-charge Gettel about a week before the still was raided.

Q. Together with a report of the activities of each of the individuals who have been charged under these complaints?

A. Only with the samples.

Q. Well, did you inform Mr. Gettel of the names of the individuals with whom you were working or who were paying you for your work?

A. Verbally.

Q. You told him that verbally?

A. Yes.

Q. And you told him that from time to time?

A. Yes.

Q. And how much were you getting per week for your hire?

Mr. Waldron: I object.

Mr. Calandra: He said he worked there and was employed.

The Commissioner: What difference does it make, even if he wasn't getting anything, or whether he was getting a great deal of money? How does that bear on the question of whether these defendants committed the crime with which they are charged?

Mr. Calandra: He said he was being paid and I am asking him how much he was being paid. What harm is there in it?

The Commissioner: That is not the test.

Mr. Calandra: I want to ask him next who paid him.

The Commissioner: That still would make no difference.

Mr. Calandra: It would make considerable difference.

The Commissioner: Will you tell me how?

Mr. Calandra: I will withdraw the question.

[fol. 55] Q. Mr. Nilson, when did you agree to go to work in this still and with whom did you make that agreement?

A. I agreed to work in the still about the latter part of April and I made that agreement with Mr. Roett.

Q. Only Mr. Roett?

A. In the presence, of course, of Mr. Trupiano and Mr. Ricciardelli and Mr. Antoniole.

Q. And what was your agreement with these men?

A. My agreement was that I was to work as mash man for a salary of $100 a week.

Q. And did you get $100 a week?

A. Yes.

Q. And, of course, you turned that money over to Mr. Gettel?

Mr. Waldron: I object.
The Commissioner: Objection sustained.

Q. Did you turn it over to Mr. Gettel?

Mr. Waldron: I object.
The Commissioner: Objection sustained.

Q. What did you do with the money?

Mr. Waldron: I object.
Mr. Calandra: On what ground?
Mr. Waldron: What he did with any emolument is immaterial to the issue.
The Commissioner: I will sustain the objection.
Mr. Calandra: Exception.
The Commissioner: Tell me once again with whom the agreement was made. I believe you said Mr. Roett. In whose presence, did you say?
The Witness: Mr. Trupiano, Mr. Ricciardelli, and Mr. Antoniole.
The Commissioner: Very well.

[fol. 56] By Mr. Calandra:

Q. And these four men agreed to pay you $100 a week to act as mash man, is that right?
A. Yes, sir.
Q. Did you assist in the erection of the still?
A. Yes, sir.
Q. What did you do?
A. I assisted in the construction of the building and the erection of the still. I put in bolts, framework for the column, the superstructure, and the setting up of the vats.
Q. Did you assist in the erection and putting in of the still proper?
A. That was in connection with the superstructure, yes.
Q. And you were paid for that?

Mr. Waldron: I object. He testified to that.
Mr. Calandra: He said he was getting $100 a week as mash man.

A. The agreement was that my salary was to start as soon as the alcohol started to run.
Q. And all work that you did prior to that was not to be paid for?

A. I wasn't paid for it.

Q. All right. You were not paid for it. How much did Kell pay you for being a farm hand there during the time these boys were setting up the works?

Mr. Waldron: I object. He didn't testify to that on direct examination and I must object, if your Honor please.

The Commissioner: Objection sustained.

. . . . . .

Q. Kell knew what was going on and what was to take place at the first meeting and when you were introduced to these men by Kell, right?

[fol. 57] Mr. Waldron: I object. This is not proper cross-examination. The testimony as to what took place between Kell and himself has already been limited and it is not material here and we are going far afield from the establishment or denial of a prima facie case.

The Commissioner: What does Kell's knowledge or non-knowledge of the still itself have to do with this case? What does it have to do with the question as to whether or not these defendants committed the various offenses with which they are charged in the complaint?

Mr. Calandra: Couldn't they have been enticed? Wouldn't you want to know that, Mr. Commissioner? I am sure that you would, sir.

Mr. Waldron: That is a matter of defense which he must establish by his own witnesses and not mine.

Mr. Calandra: You say it is not proper cross-examination. Very well. At this time I ask that Mr. Nilson now be my witness.

Mr. Waldron: Have you concluded your cross examination?

Mr. Calandra: Yes, with but one question, and then I will make him my witness.

Q. Did you, on the night of June 3rd, arrest any one of these defendants, and I shall name them; Roett, Trupiano, Ricciardelli, Pugliese, Samuel Monticello, Joseph Monticello, and Antoniole?

Mr. Waldron: I object. The question has already been asked and answered and the witness has testified to his actions on the night in question.

The Commissioner: I don't see that it has any great bearing on the case but I will permit him to answer the question. [fol. 58] The objection will be overruled.

A. No, I didn't.

Mr. Calandra: All right. Now, he is my witness.

Mr. Oliver J. Gettel: As the superior officer of this man and under the rules and regulations of the Government concerning the witnesses for the defense, I want to ask that you collect the witness fee for this man before he testifies and also the expenses that are involved in his transportation to and from this point.

Mr. Calandra: What regulation is that?

Mr. Gettel: That is the regulation and the law.

Mr. Calandra: I never heard of that. He is in court and I am now calling him as my witness.

The Commissioner: I think that is correct. If he were not in court and he were subpoenaed to be in court you would have to tender the proper subpoena and pay him his witness fee plus his mileage but he is now in court. You may proceed.

Berthold O. Nilson, was thereupon called as a witness on behalf of the Defendants.

Direct examination.

By Mr. Calandra:

Q. Mr. Nilson, when you first went to the Kell Farm and you there met Mr. Roett and these other two gentlemen, did you go there by the invitation of Mr. Kell?

Mr. Waldron: I object.

The Commissioner: Objection sustained.

[fol. 59] Mr. Calandra: He is now my witness.

The Commissioner: It still has to come within the rules of evidence.

Mr. Calandra: I am laying the foundation.

The Commissioner: I have sustained the objection.

Mr. Calandra: Exception.

Q. Now, at the time when these arrangements were made and the discussion was had that there was a still to go into

a barn that was to be erected there, did you then agree with Roett, Trupiano and Riciardelli and Kell for that to take place?

A. I don't quite understand the question.

Mr. Calandra: I will have it repeated for you.

(The question was thereupon read by the reporter.)

Mr. Waldron: I object your Honor as to whether or not he agreed or didn't agree. That has no bearing on this violation and the establishment of a prima facie case.

. . . . . .

(The following question was thereupon read by the reporter:

"Q. Now, at the time when these arrangements were made and the discussion was had that there was a still to go into a barn that was to be erected there, did you then agree with Roett, Trupiano and Ricciardelli and Kell for that to take place?")

A. I wasn't consulted at that time as to whether or not I agreed.

Q. When were you first consulted as to the fact that this illegal operation was going to take place?

A. At no time was I consulted as to whether I agreed or disagreed.

[fol. 60] Q. Well, you participated in a conversation had between Kell, the owner of the property, and the three men you named, correct?

A. I testified I was there.

Q. Yes, and what conversation took place among you five?

A. I just can't remember exactly what took place.

Q. Well, give us the substance of it.

A. I assume that the conversation was concerning the erection of a building and a still.

Q. And upon what did you base that assumption? What was said upon which you based that assumption?

A. From snatches of conversation I overheard at that meeting and a conversation I had with Kell.

Q. Who was talking to who when you were listening?

A. Mr. Kell was conversing with Mr. Roett.

Q. What did Mr. Kell say to Mr. Roett?

A. I can't testify to what Mr. Kell said to Mr. Roett.

Q. You were there and you were listening and you were there under the pretense of being Mrs. Kell's cousin.

A. Yes.

Q. And under the pretense of being a farm hand, and you are an investigator, and you want us now to understand that you can't remember or don't know the substance of the conversation had?

Mr. Waldron: I object. He is arguing with his own witness and he is now cross-examining his own witness.

Mr. Calandra: I declare him to be a hostile witness and that will settle it.

Mr. Waldron: You have laid no foundation for it, may — please the Court.

Mr. Calandra: He has shown himself to be rather reluctant to answer, your Honor.

Mr. Waldron: That is a conclusion for the Court to reach.

[fol. 61] Q. Are you able to tell us what the conversation was between Kell and Roett and these other two gentlemen, Mr. Ricciardelli and Mr. Trupiano?

A. Not at this time.

Q. Why not?

A. I can't remember exactly what was said and I have no notes to which I can refer.

Q. Did it have to do with the erection of a still?

A. Yes.

Q. You are definite about that?

A. Yes.

Q. Right?

A. Yes.

Q. And what did you say to that?

A. I was not consulted on it.

Q. Did you have any conversation—You were not consulted?

A. No.

Q. But you were there?

A. Yes.

Q. At whose invitation?

A. I wasn't invited. It happened that I was at the Kell Farm.

Q. By direction?

A. Yes.

Q. How long did you know Kell before you first met these men?

Mr. Waldron: I object.

Mr. Calandra: Why? This is my case.

Mr. Waldron: The length of time he knew Kell?

The Commissioner: I think it is relevant. I will allow it.

A. About a week.

Q. A week before the first meeting with Roett?

A. Yes, sir.

Q. What were the circumstances under which you met Kell?

A. I was introduced to Mr. Kell by Investigator Casey.

Q. What were you told before you were introduced to Kell by Investigator Casey?

[fol. 62] Mr. Waldron: I object to the question. He is not only leading his own witness——

Mr. Calandra: I am not telling him what to say but asking him a question.

Mr. Waldron: You haven't laid the proper foundation and even then it will be immaterial. The matter of his relationship has already been testified to.

Mr. Calandra: I want to know how he met him.

The Commissioner: I don't see that it makes any difference what he was told before he was introduced.

Mr. Calandra: All right.

Q. Were you told that somebody was going to put a still on the Kell Farm by Investigator Casey?

Mr. Waldron: I object. This is hearsay. What Investigator Casey said is available to Mr. Calandra and it is immaterial besides.

The Commissioner: I will allow it. This goes now to a very important question so far as this case is concerned and that is whether or not there was entrapment on the part of the Alcohol Tax Unit agency and my feeling in the matter right now is that entrapment does not result from any one single fact. It might possibly result from a great many facts put together. I think it is relevant and you may answer the question. Let us have the question repeated.

(The following question was thereupon read by the reporter:

"Q. Were you told that somebody was going to put a still on the Kell Farm by Investigator Casey?")

A. Investigator Casey told me that he had information that a still was to be erected.

Q. Where?

A. On the Kell property.

[fol. 63] Q. And what else did Mr. Casey tell you?

Mr. Waldron: I object to that. It is still hearsay. Even though it may be relevant the hearsay rule still applies.

The Commissioner: I think that is correct. It is hearsay evidence. I will sustain the objection.

Mr. Calandra: I pray an exception.

Q. Now, did Mr. Casey tell you the name of the individual or individuals who were going to set up this still before you met Mr. Kell?

Mr. Waldron: I object. There is no information in the record that Casey said that.

Mr. Calandra: I am asking him the question.

The Commissioner: I will allow it.

Mr. Waldron: It is still within the hearsay rule. There has been no foundation laid as to whether or not Casey is speaking of his own knowledge or not.

Mr. Calandra: I am only asking him what Casey said. I am bound by his testimony and it is not hurting him at all and even if it is hearsay the Commissioner can rule on it later.

The Commissioner: I will allow it.

Mr. Calandra: May I have the question repeated.

(The following question was thereupon read by the reporter:

"Q. Now, did Mr. Casey tell you the name of the individual or individuals who were going to set up this still before you met Mr. Kell?")

A. No, he didn't.

Q. Did Casey direct you to work up there as a farm hand so as to get these people to come in?

[fol. 64] Mr. Waldron: I object to the wording of the question.

Q. Or aid these people in coming in and going on with this operation.

Mr. Waldron: I object to the question, if the Court please. It is a two-fold question.

Mr. Calandra: I will reframe the question and ask it this way.

Q. Did Mr. Casey or Mr. Gettel or any one of your superiors or co-agents instruct you to go up to the Kell Farm and assist in the arrangements for the erection of this barn and still?

A. Mr. Gettel gave me the assignment and I was instructed by him to report at the Kell Farm.

Q. And do what?

A. Conduct the investigation.

Q. And what else?

A. I was to assist Kell and whoever else participated in the erection of the barn and the still.

Q. And how were you to do that? How were you to assist him?

A. In whatever manner the operators requested.

Q. I see, and to encourage Kell to go along with whatever suggestions were being made by these men as well as Kell himself, right?

Mr. Waldron: I object to that as being leading and it is not material or rather there is no foundation shown as to the influence of this man over Kell. What difference would it make if a perfect stranger tried to influence Kell?

The Commissioner: But this man was not a perfect stranger. This man is an agent of the Government which has as one of its functions the investigation of violations of [fol. 65] the Internal Revenue Code and the initiation of prosecution for such violations. He testified that in his capacity as an agent of the Alcohol Tax Unit he received a specific assignment from his superior to go to the Kell Farm to conduct an investigation and to assist Mr. Kell and anyone else who was interested in putting up this still. Now, to say that this witness is a stranger is certainly carrying the idea, I think, to a rather remote point.

Mr. Waldron: May I have the question read.

(The following question was thereupon read by the reporter:

"Q. I see, and to encourage Kell to go along with whatever suggestions were being made by these men as well as Kell himself, right?")

The Commissioner: I don't see any objection to that question. He can answer yes or no. If he was told to encourage him then his answer might be Yes, and if he was told not to encourage him his answer might be No. I think he can answer the question. The answer might have an important bearing on this question of entrapment. Will you answer the question.

A. Do you mean was I instructed by my superiors to encourage Kell to go on with this?

Q. Yes, that is exactly what I mean.

A. Let me see—I am trying to think of any particular instances where I was instructed to encourage Mr. Kell.

Q. Just give us the truth, that's all.

[fol. 66] Mr. Waldron: Your Honor, how is this material? This man's association or encouragement of this man Kell? I fail to see the connection.

The Commissioner: What have you to say about that, Mr. Calandra?

Mr. Calandra: You have already ruled on the question and he is duty bound to answer it.

The Commissioner: Counsel has just raised a question. Let us have counsel's statement read, Miss Adler.

(The reporter thereupon read the remarks of Mr. Waldron.)

Mr. Calandra: It is very material. Here is a Government officer who has two duties to perform. One is to prevent crime and the other is to suppress it and we want to know, and we have a right to know, whether he encouraged this man or not, by the facts.

The Commissioner: I will permit the question and overrule the objection. Answer the question.

A: No, I was not.

Q. What were you told, Mr. Nilson, by any of your superiors or any of your co-associates——

Mr. Waldron: I object.

Q. —to say to Kell when you went there for this meeting?

Mr. Waldron: I will withdraw the objection.

A. I was introduced to Mr. Kell by Investigator Casey and I was not instructed by anyone as to what to say to Mr. Kell.

[fol. 67] Q. But you told Mr. Kell that you were an agent of the United States of America connected with the Alcohol Tax Unit, did you not?

A. Yes, sir.

Q. At the very first time that you met him.

A. Yes, sir.

Q. And did you tell him what your purpose was in being present there to work under the pretense of being a farm hand?

A. I personally didn't tell him that. I think Investigator Casey explained that to him.

Q. I see. In other words, you or Investigator Casey instructed Kell to let these fellows come on, rent this place to them, erect this barn and operate a distillery and Kell was not to say a word to anyone about it, just permit them to go right on and go through with this whole thing. Is that it?

A. Yes, sir.

Q. That was it. All right. How much money did Kell pay you?

Mr. Waldron: That was testified to before, and I object.

The Commissioner: No. He testified he was paid $100 a week by the people who operated the still if I recall. Am I correct in my recollection?

Mr. Calandra: That is correct.

The Commissioner: I don't think there has been any testimony thus far as to any compensation that was paid to the witness by Mr. Kell.

Mr. Waldron: Then I predicate my objection on the basis that it is immaterial to the issue.

Mr. Calandra: That is the issue now. It is most material to the issue of enticement and entrapment.

The Commissioner: I will allow it.

The Witness: May I have the question repeated.

[fol. 68] (The following question was thereupon read by the reporter:

"Q. How much money did Kell pay you?")

A. Kell paid me no salary.

Q. Was that by agreement and understanding?

A. Yes, sir.

Q. How much rent was Kell to get for the use and oc-

cupancy by these people of the premises assigned to them for the purpose of operating this still there?

A. He was to get $300 per month.

Q. Do you know whether that was paid to him?

A. Yes, sir.

Q. And for how many months did he receive the rent?

A. One.

Q. During all of the times that you were on the premises from the period when you started, when you were first introduced to Kell, up to and including the day following the raid, June 4th of this year, did you constantly confer with Kell?

A. Yes, sir.

Q. And did Kell ask your advice as to the many things that were going on there?

A. No, sir.

Q. Did you give Kell any instructions as to what he should or shouldn't do?

A. No, sir.

The Commissioner: This is off the record.

(Discussion off the record.)

Q. Was Kell deputized as an agent of the Alcohol Tax Unit?

A. Not to my knowledge.

Q. Did you keep a record of the daily production of this still?

A. Yes, sir.

Q. And what was the daily production of this still?

Mr. Waldron: I fail to see, your Honor, where this is material.

[fol. 69] Mr. Calandra: It is very important at nine dollars or ten dollars a gallon tax. It is very important.

Mr. Waldron: How is it important? The mere keeping of a record could hardly be connected with this violation that is charged on June 3rd.

The Commissioner: I will tell you, Mr. Waldron, there is one thing we should consider on this whole question of ruling on evidence. I am hearing this case now without a jury and for that reason I am very much inclined to permit the evidence to go in if there is an element of doubt as to its

relevancy, materiality or its competency and I think it does have some bearing on the subject and I will let him answer the question.

Mr. Waldron: I appreciate your stand, your Honor, in that regard but I still think your ruling imposes too great a burden on the Government, and I say that with all due respect. You are, in effect, ruling that we must establish our case by a preponderance of the evidence or beyond a reasonable doubt.

The Commissioner: No, I disagree with you. Mr. Calandra is now going into his defense, as far as this witness is concerned, and I think in a criminal proceeding he should be accorded fairly wide latitude in presenting evidence which bears on the case. I don't see how the Government will be prejudiced or how the Government will have any great burden imposed upon it by letting this particular question be answered. Of course, I can only deal with other questions as they come up.

Mr. Waldron: I will withdraw my objection.

The Witness: May I have the question repeated.

[fol. 70] (The following question was thereupon read by the reporter:

"Q. And what was the daily production of this still?")

A. The daily production was approximately ninety-four to ninety-eight five gallons per day.

Q. So that you would say between four hundred and five hundred gallons of illicit alcohol was being manufactured there per day.

A. Yes.

Q. And for what period of time?

A. Approximately three weeks.

Q. Approximately three weeks?

A. Yes.

Q. And was it a daily operation?

A. Yes.

Q. I see. And did you make those reports daily to Mr. Gettel or to any of your co-agents?

A. No, sir.

Q. When did you make your report to them?

A. Periodically I would manage to contact my superiors, at least once a week.

Q. I see, and when you did that you gave them the whole resume for the week.

A. Only verbally, sir.

Q. Yes, of course. And who was the superior you gave that information to?

A. Investigator-in-charge Gettel.

Q. I wish to take you back a moment, Mr. Nilson—I am sorry to jump like this—but at the time this agreement for rental was made at $300 per month, by whom was it made?

A. That I don't know, sir.

Q. Well, was it made by Ricciardelli, Roett, Trupiano? Were the three there at the time arrangements were made to rent the place at $300 per month?

A. As far as I know the arrangements were made with Mr. Roett, and that was only what Mr. Kell related to me.

Q. I see, but these other two men were there when the three hundred dollar arrangement was perfected, is that correct?

A. I can't say, sir, because I don't recall ever being present when the final arrangements were made or a price stipulated at $300 per month.

[fol. 71] Q. Who was talking about rent that the three of them, Roett, Trupiano and Ricciardelli were to pay? You say they were there discussing the figure as to the amount of rental they were to pay.

A. Yes.

Q. And they were all there together?

A. Yes.

Q. With Kell?

A. Yes.

Q. And you were just listening?

A. Yes.

Q. And each one had something to say as to the reasonableness or unreasonableness of the rent?

A. Principally between Ricciardelli and Mr. Roett.

Q. I see. They, in your mind, were the principals, you assumed that——

Mr. Walron: I object to that as calling for a conclusion.

The Commissioner: I think so.

Mr. Calandra: I am satisfied with a conclusion.

The Commissioner: I don't think it is for the witness to characterize who were the principals and who were the accomplices. I will sustain the objection.

Q. Incidentally, Mr. Nilson, on June 3, 1946 which is the day of the night of the raid, you were on the farm premises and at this barn practically all day and a good part of the evening, is that right?

A. Yes, sir.

Q. Did you come to Commissioner Goldstein for a search warrant?

A. No, sir.

Q. And you yourself assisted in the manner which you have described, starting with the erection of the still, in the framework, in the mixing of mash, helping to fill cans occasionally—you were there every day performing some work in aid of this illicit operation, is that right?

A. That's right.

[fol. 72] Q. And for which you were receiving $100 per week, is that correct?

A. Yes, sir.

Q. Where were you living at that time, where were you sleeping?

A. At the Kell Farm.

Q. And did you live at the little shack in the back that was built there?

A. I lived in the little house right adjacent to the Kell house proper.

Q. And you worked pretty hard there, didn't you?

A. At times.

Q. I know you did. That is all.

Cross-examination.

By Mr. Waldron:

Q. Mr. Nilson, when you first went upon the farm, did you offer to Mr. Kell any promise or reward or any payment of money for his cooperation in this case?

A. No, sir.

Q. Did you offer to any of the defendants any encouragement either by word of mouth or by payment of funds, to go on with the production of illicit alcohol?

A. No, sir.

Mr. Waldron: I have nothing further.

Mr. Calandra: I have nothing further.

Mr. Waldron: I have one other witness, if you please, Commissioner. I will now call Mr. Gettel.

OLIVER J. GETTEL, being first daily sworn in behalf of the Government, testified as follows:

Direct examination.

By Mr. Waldron:

Q. Mr. Gettel——

Mr. Waldron: Preliminary to examining this witness, your Honor, I would like a ruling on this one question of [fol. 73] law. I intend to establish the presence of one defendant, merely, by the testimony of this witness and I will ask you if you will restrict defense counsel on his cross-examination to the matters that I now adduce.

The Commissioner: Well, of course, my answer to your question has to be that I will limit the cross examination to the area covered by your direct.

Mr. Waldron: Thank you, sir.

The Commissioner: In other words, I will follow the established rules of evidence on that point.

Mr. Waldron: Thank you, sir.

Q. Mr. Gettel, what is your official position?

A. Investigator-in-charge of the Alcohol Tax Unit, Treasury Department, United States Government.

Q. And acting in such official capacity were you at the Kell Farm on the evening of June 3rd?

A. I was.

Q. Did you observe Frank Pugliese on the Kell Farm?

A. He came to the farm shortly after midnight June 3rd or early June 4th, 1946.

Q. What was he doing?

A. He, Pugliese, came in driving a truck loaded with bags of coke, a few more than fifty, and he was accompanied by Joseph Monticello. Pugliese was driving, and I apprehended them as they pulled up.

Mr. Waldron: That is all.

Cross-examination.

By Mr. Calandra:

Q. How far from the still house did you apprehend them, Mr. Gettel?

A. It was at the end of the trail. If you drive right up to the building it was about thirty-five feet.

Q. From the entrance of the farm building to the still?

A. Yes, sir.

Q. And they were both on the truck at that time?

A. Yes.

[fol. 74] Q. And that is all you saw them do is driving this truck.

A. Yes.

Q. And you placed them under arrest?

A. Yes.

Q. Did you question them as to their presence there?

A. Very little.

Q. What did you ask them?

A. I merely commanded them to get out of the truck and I took them into the still house and turned them over to the other investigators.

Q. Did you question them as to what they were doing there?

A. No.

Mr. Calandra: All right.

Now, if your Honor please, I ask that Mr. Kettel be called as my witness.

The Commissioner: Very well.

Oliver J. Gettel, being called as a witness in behalf of the Defendants, testified as follows:

Direct examination.

By Mr. Calandra:

Q. Mr. Gettel, when did you first learn that there was a still on the Kell farm?

A. Well, when it was being erected.

Q. How long before the raid, how long before June 3rd?

A. You mean from the first day of operation?

Q. Yes, that's right.

A. The first day of setting up the still was the first day of operation.

Q. I asked you before when you first learned there was going to be a still there and you answered when it was being erected. When was that?

A. The still was completed about three weeks prior to June 3rd, that is, ready for operation.

Q. And you obtained that information from an investigator, is that right?

A. That's right.

[fol. 75] Q. And who was that investigator?

A. Mr. Nilson.

Q. Was he the only agent that gave you such information?

A. That's right.

Q. And from that point on you had it under observation by other agents other than Mr. Nilson.

A. No, not from that point on, no, sir.

Q. How frequently did you get reports from Mr. Nilson as to what was going on in the barn, as to the operation and its production?

A. Periodically during that time and prior to that time. Approximately once a week.

Q. And you knew that finished product was coming out of there.

A. I did.

Q. And you knew, as well, how many cans, approximately, had been manufactured each week for the three week period before you decided to make the raid, didn't you?

A. That's right.

Q. Did you get a search warrant?

A. No, sir.

Q. Did you instruct any of your officers to get a search warrant?

A. No, sir.

Q. Did you ever talk with Kell?

A. Yes, I talked to Kell the day of the raid.

Q. Did you ever talk with him before that?

A. Yes, I did.

Q. When?

A. On several occasions.

Q. Give us the dates of those occasions, please.

A. From memory I can't be accurate in giving those.

Q. All right. The last time before the day of the raid when did you see him?

A. Oh, about two weeks prior to that.

Q. So you hadn't seen him for two weeks until the day of the raid.

A. That's right.

Q. And where did you see Kell?

A. I saw him around the still house and at the farm house and around the farm.

Q. You were on the still premises two weeks before?

A. I thought you referred to the day of the raid.

[fol. 76] Q. No, where did you speak to Kell two weeks before the raid?

A. Down in the country, away from the farm.

Q. Away from the farm?

A. Yes.

Q. And what did you talk about?

A. I didn't talk too much to him.

Q. Well, what was the purpose of the meeting?

A. Just to talk this case over, to talk about what was going on there.

Q. I see, and he was giving you information.

A. No, he didn't give me much information.

Q. Well, were you giving him much information?

A. None.

Q. You said you talked to him about this case. Explain your answer, if you will, please.

Mr. Waldron: I object to this line of questioning. Kell is neither a defendant nor is he here to be questioned and Mr. Calandra has permission to call Mr. Kell.

Mr. Calandra: We will.

The Commissioner: I think it goes to the question as to whether or not the Government by any act or acts on its part induced or enticed the defendants to engage in this alleged illegal enterprise and that inducement or enticement could have been made through Mr. Kell, perhaps. I don't, of course, say it is so but I think counsel is entitled to probe into that question to find out whether or not the Alcohol Tax Unit, through Mr. Gettel, did tell Mr. Kell to do this, that or the other thing, and I think it is evidential on that score.

Mr. Waldron: I will withdraw my objection on that ground. May I point out that no foundation has been laid as yet between Kell and Gettel and the defendants.

[fol. 77] Mr. Calandra: I am getting to that. Mr. Gettel doesn't remember without benefit of his notes and I am trying to help him remember, don't you see.

Mr. Waldron: I will withdraw the objection.

The Commissioner: I assume in reference to any line of testimony that has to be connected up in order to be inte-

grated properly in the record that it will be so connected up and if it is not so connected you may reserve your right at the proper time to move to strike any portion of the testimony. I think that where counsel states, however, that he will connect it up, I believe we have a right to assume that he will do so.

Mr. Waldron: Under those circumstances I am agreeable.

The Witness: May I have the question repeated.

(The following question was thereupon read by the reporter:

"Q. You said you talked to him about this case. Explain your answer, if you will, please.")

A. Well, Mr. Nilson came out to report to me and Mr. Kell was along with him but I had not asked for Mr. Kell to come along and there was very little said to Kell. I talked to Mr. Nilson quite a bit about the case.

Q. In the presence of Kell?

A. Kell couldn't hear what I was talking to Mr. Nilson about. I bid him the time of day, that is Mr. Kell, and I just spoke generally to him but not about this case and not having reference to this case even.

Q. I see. That was two weeks prior to June 3rd, about?

A. That's right.

Q. Now, the time previous to that, when did you see Kell and where?

A. Oh, that was some months before.

[fol. 78] Q. Where did you see Kell?

A. I believe at his farm.

Q. Was that before the still went in?

A. That's right.

Q. Was that the time that Mr. Nilson was instructed to got to work on the farm as a farm hand?

A. No, sir.

Q. Well, when was that?

A. It was several months ago. I would have to look at my notes to be able to give you the exact date.

Q. What was the subject of conversation between you and Kell at that time?

A. I was informed at that time by Mr. Kell that certain individuals had been to see him again and were desirous of placing or erecting a still upon his premises and operating it.

Q. And what did you tell Kell?

A. I told him that it was up to him.

Q. Did you tell him to go ahead and make the arrangements?

A. Not to make any arrangements whatever.

Q. What was up to him?

A. Whether or not to accept the proposition that was extended to him by those operators.

Q. Well, didn't you tell him who you were?

A. Yes, he knew who I was, certainly.

Q. And did you tell him that you were a Federal enforcement officer and that he should not accept any proposition whereby an illicit still could be put on his farm?

A. No, sir, I didn't instruct him along that line.

Q. You didn't tell him not to go through with such a proposition, that it was in violation of the law and that he could get in trouble?

A. No, sir. I told him that if he did so and wanted to work with the Government that the Government would be with him.

Q. In other words, you mean to tell us that you said to Kell, "Now go ahead and let them put the still on the farm and you work with us and supply us with the information, and if you are with us nothing will happen to you," [fol. 79] did you tell him that?

A. He was doing it for the United States Government.

Q. And you encouraged him to go ahead.

A. I didn't encourage him at all.

Q. You didn't tell him not to do it, did you, Mr. Gettel?

A. No, I didn't tell him not to.

Q. Then you did tell him to go ahead and do it and be with Uncle Sam.

Mr. Waldron: I object. He is arguing with the witness, if the Commissioner please.

The Commissioner: Let us all be mindful of the fact that this is your witness.

Mr. Calandra: I am sorry, sir.

Q. You didn't stop him from going ahead with the carrying out of any arrangements that he had for renting this place and permitting this illicit operation going on, did you?

A. I didn't.

Q. You permitted him to go right ahead with the agree-

ment that he would keep you informed and have Nilson there as a farm hand, Mr. Gettel?

A. Nilson was not discussed at that time.

Q. I see. When did Nilson come into the picture? Was that after you talked with Kell that if he wanted to be on the side of the Government——

A. He came in on one of the occasions when I talked with Mr. Kell.

Q. What occasion was that?

A. I think I told you that I don't have my notes and I can't tell you accurately when it was.

Q. Give us your best recollection. You have given us June 3rd as a day when you saw Kell, and you said you saw him two weeks before that, that you met him in the country with Nilson——

A. Yes.

[fol. 80] Q. —and the next previous occasion was some couple of months before when you got this information that some people had approached him to set up a still on his property, right?

A. That is right, that is substantially correct.

Q. And you told him to go ahead and let these fellows come in there.

A. If they came to him for that purpose, yes.

Q. To go ahead, right?

A. Not for him to go ahead but to let them go ahead.

Q. But it was his property.

A. Yes.

Q. And they couldn't go ahead on his property without his permission.

A. Not without coming to him.

Q. And you gave him the green light.

A. As far as we were concerned, and he was to keep us fully advised.

Q. And at the 'go ahead' conversation that you just mentioned, at that time, there was not a barn or a still or a vat or a drop of alcohol yet manufactured or set up in operation.

A. No.

Q. There was nothing set up, is that right?

A. Nothing, only an offer.

Q. Made by whom to whom?

A. To Mr. Kell.

Q. By whom?

A. I didn't know at the time who made the offer.

Q. He didn't give you the names, I suppose.

A. No, he didn't.

Q. He probably didn't know that himself.

A. That I couldn't say.

Q. And that was the arrangement, agreement and understanding, that you had with Kell, is that right?

A. That and on prior occasions, yes.

Q. Now, when was the occasion prior to the two month lapse, the occasion previous to the one you just talked about?

A. I said I met him several times along that line but I can't give you the exact dates.

[fol. 81] Q. I am not asking for the exact dates but I am asking you to give us the approximate time. Just give us the conversations, all of them, that is what I am asking you.

A. That is all I recall.

Q. And you met him several times previous to the go ahead time that you spoke of. Where did you meet him?

A. I met him at the farm two or three times.

Q. And there was no barn or still there at that time.

A. No.

Q. What was your reason for meeting him so many times on this farm?

A. I had information that they had made this offer to him to put a still on his farm.

Q. Did you at any time instruct him not to go through with it because he would be violating the law?

A. No.

Q. Did you deputize Kell as a Federal agent from the first time you met him?

A. I don't know what you mean by that.

Q. Did you swear him in as an agent?

A. No, sir, I did not swear him in as an agent.

Q. Do you know whether he is an agent of the United States Government?

A. I cannot swear to it but he is not to my knowledge.

Q. He is not?

A. Not to my knowledge.

Q. Who introduced Kell to you?

Mr. Waldron: I object to that question, if your Honor please, as not being material.

The Commissioner: What difference does it make who introduced him? I can't see that it has any relevancy and I will sustain the objection.

Mr. Calandra: Just one more question.

Q. You are in charge of this case, are you not?

A. No, sir.

[fol. 82] Q. Who is?

A. That is, no longer. The main office is in charge of it.

Q. I mean so far as New Jersey is concerned.

A. Mr. Bolan at the main office.

Q. The assistant supervisor?

A. Yes, he is in charge of it.

Q. Has Kell been arrested and charged with a violation of the Internal Revenue laws committed by him as a direct aider and abetter, on his farm?

Mr. Waldron: I object to that.

The Commissioner: I will sustain the objection.

Mr. Calandra: Exception.

Q. Will Kell be arrested and charged with the violation of the Internal Revenue laws committed on his farm, the same as these defendants now standing before this court?

Mr. Waldron: I object to that as being immaterial.

The Commissioner: Is that the only ground for your objection?

Mr. Waldron: And on the further ground that it is irrelevant and not in issue and that it calls for a future action over which we have no control and upon which future investigation must be made before we can come to that conclusion.

The Commissioner: I asked that question of you, Mr. Waldron, because if you objected only because it was immaterial I would have to overrule the ob-ection but on the basis of your restated objection I will sustain the ob-ection.

Mr. Calandra: Exception.

Q. Mr. Gettel, did you have a talk with any of the other defendants who are arraigned here today before the Bar?

[fol. 83] A. No, outside of bidding them the time of day. In other words, you might say, "How do you do," or something like that. Mr. Roett wanted to talk to me but he had nothing to say.

Q. Was there anything said?

A. Very, very little was said.

Q. Do you recall anything he said, or any of the other men?

A. I believe he asked Mr. Van De Car if he could talk to the boss and Mr. Van De Car said that I was boss and I said, "If you have anything to say, you can say it now, these are my buddies."

Q. And he wouldn't say anything.

A. He wouldn't say anything.

Mr. Calandra: That is all.

Mr. Waldron: No cross. We have no further witnesses.

Mr. Calandra: If that is the Government's case I will not take up your Honor's time with respect to certain of the defendants, with the exception of two. I might state this argument is off the record.

. . . . . .

Mr. Calandra: Is Mr. Kell here? I subpoenaed him through the United States Marshal's office, Commissioner.

The Commissioner: I don't know.

Mr. Waldron: Yes, he is here.

[fol. 84] COPELAND KELL, being first duly sworn in behalf of the Defendants, testified as follows:

The Commissioner: Where do you live, Mr. Kell?

The Witness: Allenwood, New Jersey.

Direct examination.

By Mr. Calandra:

Q. What is the correct address, Mr. Kell?

A. My farm is in Allenwood, Wall Township and the post office is Box 733.

Q. Mr. Kell, you were subpoenaed to be here by the United States Marshal's office?

A. Last night.

Q. A subpoena was served upon you?

A. Yes, sir.

Q. Are you the owner of the farm located at the address you have just given to us?

A. That's right.

Q. And how long have you owned that farm?

A. Approximately three years.

Q. What type of a farm is it? What do you do there? What do you farm?

A. I engage in general farming.

Q. General farming?

A. Yes.

Q. How many acres do you have?

A. Approximately one hundred.

Q. Did you own this farm on June 3, 1946?

A. I did.

Q. And did you own this farm or were you the owner of this farm for approximately five months prior to June 3, 1946?

A. I was.

Q. Do you recognize Mr. Riordan Roett——

A. I do.

— —in this room?

A. Known to me as Mr. Johnson.

Q. Mr. Johnson?

A. Yes.

Q. Did you meet with him at your farm in January, February, March, April, May or June of this year?

A. I am positive of all those months except January and I believe I did meet him in January.

[fol. 85] Q. Where did you meet him in January 1946?

A. He came to the house.

Q. He came to your house?

A. Yes.

Q. And your house is situated right on the farm property?

A. That's right.

Q. And who was with him, if anyone?

A. I don't know who was with him but he had somebody in the car.

Q. Did he talk with you?

A. Yes.

Q. Who was present when he talked with you, besides you and he?

A. At the conversation?

Q. Yes.

A. We were alone. Mrs. Kell was in the next room.

Q. Were you talking softly?

A. Not necessarily.

Q. Do you know of your own knowledge whether Mrs. Kell could hear what the conversation was between you and Mr. Roett, also known to you as Mr. Johnson?

A. I don't know. Possibly she got snatches of the conversation.

Q. What was the conversation, Mr. Kell?

A. Johnson wanted to rent a part of the farm.

Q. For what purpose?

A. He didn't say.

Q. He didn't say.

A. Not in so many words. He was not explicit and that raised by suspicions.

Q. And that was in January 1946?

A. Yes.

Q. And did you come to any terms or understanding at that time, and I am speaking of the first meeting in January 1946, with Mr. Johnson.

A. Did I come to any terms?

Q. Yes.

A. I was suspicious of him and I came to no terms.

Q. Did you see him after that?

A. Yes.

Q. Where did you see him?

A. On the farm.

Q. Who was with him?

A. I am not positive who was with him at the next meeting.

Q. How long after the first meeting did you see him the second time or the second meeting?

[fol. 86] A. For the record, I have made a mistake about the second meeting. I didn't meet him at the farm.

Q. Where did you meet him?

A. He came to the farm and Mrs. Kell sent him to Point Pleasant where I was at that time.

Q. And you were alone?

A. Yes.

Q. And did you talk to him again?

A. Yes.

Q. And what did you talk to him about?

A. He urged me to rent him a section of the farm on which he could erect a building.

Q. And did you agree with him then?

A. I did not.

Q. Why not?

A. Because I didn't feel that I should do it.

Q. What was the conversation about and why didn't you feel you should do it and just what do you mean by "it"?

A. To rent the building. I was still suspicious.

Q. And because you were suspicious of what business might be conducted in this barn you want us to understand that you didn't come to any terms with Mr. Roett, whom you know as Johnson.

A. I didn't come to any terms at that meeting.

Q. I see. And how long after the first meeting in January did the second meeting take place?

A. My mind is not quite clear on that, possibly several weeks.

Q. Several weeks,

A. Yes.

Q. Now, did you, after your first meeting in January with Mr. Roett, did you convey your suspicions to anyone? Did you mention it to anyone or discuss what your suspicions were with anyone?

A. I discussed it with Mrs. Kell and I was also so suspicious that I got in touch with an agent of the Federal Alcohol Tax Unit.

Q. Who was that?

A. Homer Casey.

Q. When was the first time you got in touch with Homer Casey?

A. I don't remember.

[fol. 87] Q. Was it immediately after the first visit?

A. No.

Q. Was it immediately after the second meeting with Mr. Roett whom you know as Johnson?

A. No.

Q. How long after the second meeting where you did not, as I understand you, come to terms with Mr. Roett, did you talk to Mr. Casey?

A. The exact time I don't know.

Q. Give it to us in point of weeks or days.

A. Several—possibly a week.

Q. Possibly a week later?

A. Yes.

Q. And at that time you had come to no understanding or arrangement with Mr. Johnson for the renting of any

part of your farm for the purpose of erecting a building there, is that correct?

A. I had come to no agreement with him.

Q. Yes. Now, when was the next time after the second time that you saw Mr. Roett whom you knew as Johnson?

A. The meeting took place at the farm but as to when it was I can't tell you. He came in many times.

Q. On this first or second occasion did he tell you exactly what business would be conducted in this building that was proposed to be erected there?

A. During our various meetings?

Q. I am speaking now of the first and second meeting.

A. It was not mentioned explicitly.

Q. You didn't know exactly what he was going to put there, is that right?

A. There was room left for my imagination.

Q. But nothing was said specifically.

A. Not definitely.

Q. In other words, if I understand you correctly, it was left to your imagination as to what would transpire in this building.

A. Yes, in the first and second meetings. That is so.

Q. Yes, and the third meeting was held, you say, a week after the second meeting.

A. Approximately.

[fol. 88] Q. Yes. And who was with Mr. Johnson at that time?

A. I don't know.

Q. How many people were with him?

A. I don't know.

Q. Will you please look around this room and if there is anyone here you recognize don't hesitate at all to identify them.

A. At any specific meeting?

Q. We just want the true facts.

A. Shall I identify anybody that was there at the third meeting? Is that what you want?

Q. Yes, sir.

A. I am unable to do that. My mind is too confused as to who was with him at that time. He came in so many times with people and so to pin it down to the third visit I couldn't do that.

Q. I see. Now, at the third visit was anything definite discussed as to the erection of the building and the supposed business to be operated therein, Mr. Kell?

A. Those discussions—the main thing discussed was the man's requirements.

Q. Explain that, please.

A. He had certain requirements for the usefulness and the location of the building.

Q. What were they?

A. One was access, the road. Another one was that he needed a quantity of water, and those matters came up for discussion during those meetings.

Q. And during those meetings—you are now referring to the meetings after the third meeting, and including the third meeting, wherein several other people were with him.

A. Those matters were all discussed at all these meetings.

Q. I see. Now, when these matters were discussed at all these meetings, with reference to the requirements, do you now recognize, in this room, any person or persons and I want you to identify them without any fear or favor, Mr. Kell, any person or persons that were present, talking with you and Mr. Roett, who you know as Johnson.

[fol. 89] A. I am to identify anybody who was there at any time, during any of those meetings?

Q. Yes.

A. And they extended over two or probably three months.

Q. Yes. Do that, please.

A. I recognize Mr. Roett. Tony.

The Commissioner: Tony who?

The Witness: I knew him as Tony.

Mr. Calandra: Antoniole.

A. And Dominick; the man next to him.

Q. Ricciardelli. You knew him as Dominick?

A. Yes. And this man, Jack.

The Commissioner: Trupiano?

The Witness: Yes.

Q. All right. Now, each of the men whom you have just identified participated in conversations with you relating to the requirements, their requirements, is that correct?

A. That is correct.

Q. And each of them took an interest in explaining to you exactly what their requirements would be, Mr. Kell?

A. Yes.

Q. Yes, and did you come to any definite, conclusive understanding with these men? I am now referring to Mr. Roett, Mr. Trupiano, Mr. Antoniole and Mr. Ricciardelli whom you identified as Dominick.

A. Your question is, did I come to any definite agreement with them?

Q. Yes.

A. Eventually, yes.

Q. When did that come about, Mr. Kell?

A. I don't know the date.

Q. Approximately?

A. Approximately toward the end of March.

Q. Toward the end of March?

A. Yes.

[fol. 90] Q. And what arrangements, agreement and understanding did you come to with Mr. Roett, Mr. Trupiano, Mr. Antoniole and Mr. Ricciardelli?

A. I agreed to allow them to use the property. They were to build a building suitable to them and to some extent suitable to me.

Q. And what was that to be?

A. The building was to be of a certain specific height and square footage and area, and they also required a quantity of water.

Q. And how was that arranged for?

A. They arranged to locate a well driller and drill a well.

Q. And that was to be at whose expense?

A. Their expense.

Q. And you mean these four men whom you have identified a few moments ago.

A. My business dealings were all with Roett.

Q. But these three men were present at the time.

A. Yes, acting in the capacity of technicians.

Q. And they participated in the discussions with you relating to their requirements as to water, roads, and so forth.

A. That is correct.

Q. Who called the well driller in, Mr. Kell?

A. Mr. Roett.

Q. Did you recommend the well driller?

A. No.

Q. Do you know who the well driller was?

A. I never heard of him before he came to the property.

Q. You didn't call him, in any event.

A. I didn't call him.

Q. And what agreement was made between you and these four men relating to the rental, if any, that you were to be paid for the use and occupancy of a part of your premises?

A. Do you want to know the agreement?

Q. Yes.

A. They agreed to pay a rental of $300 a month.

[fol. 91] Q. And that was agreed upon between you and these four men, Trupiano, Roett, Antoniole and Ricciardelli whom you know as Dominick.

A. It was agreed upon between me and Roett.

Q. And these other three men were present at the arrangement.

A. They knew of it. We were all there together.

Q. Yes. Did you ask for a lease or was one offered to you?

A. One was offered to me.

Q. Did you get a lease?

A. Eventually.

Q. Who gave it to you?

A. Roett.

Q. And to whom was the lease made?

A. Copeland Kell.

Q. And who was the tenant?

A. One—I don't remember the name.

Q. Do you have the lease?

A. Not with me, no.

Q. Who has it?

A. I don't know just what happened to it. It was of no value and it wasn't legal in a court of law, and I didn't pay attention to it.

Q. Did you give it to anybody?

A. No.

Q. Did you give it to Mr. Casey?

A. No.

Q. Did you give it to Mr. Gettel?

A. No.

Q. Or to Mr. Van De Car?

A. No.

Q. Or to any Federal agent?

Mr. Waldron: I object to that as leading. This man is his witness.

Mr. Calandra: I am asking direct questions.

Q. Did you give it to anyone connected with the Federal Government?

A. No.

Q. Now, I wish to bring your mind back and I want you to be completely orientated so that you can fairly answer the question. Prior to the final meeting whereat the rental was agreed upon, did you communicate to any Federal [fol. 92] officer what you had discussed with these men, these four men?

A. I would like the question repeated.

(Question read to the witness.)

A. The answer is yes.

Q. When?

A. I don't know the date.

Q. When did you first discuss with Homer Casey anything pertaining to Mr. Roett, known to you as Johnson, and these other gentlemen whom you have identified?

A. I cannot give you the date.

Q. How long before the latter part of March 1946?

A. Mr. Casey came to see me in March and I informed him.

Q. How did he come to see you, if you know.

A. I don't know.

Q. Did you send for him?

A. I sent word to him.

Q. That you wished to speak with him?

A. That's right.

Q. And he came to your farm?

A. Yes.

Q. And he came to your house?

A. Yes.

Q. Did you know at the time that you sent for Mr. Casey, and I am speaking of the event we are now discussing, that a still was going to be erected in the barn?

A. Yes.

Q. You knew that and you told that to Mr. Casey, correct?

A. Definitely, I told him.

Q. And that was before any road or barn building was erected by these people on your farm, wasn't it?

A. Yes, sir.

Q. And Mr. Casey introduced you to another gentleman, didn't he, by the name of Oliver J. Gettel?

A. On one occasion Mr. Gettel was with him, yes.

Q. And you were introduced to Mr. Gettel by Homer Casey, weren't you?

A. That's right.

Q. And he introduced Mr. Gettel to you as a Federal officer, right?

A. Yes.

[fol. 93] Q. And as his superior, as Mr. Casey's superior.

A. That's right.

Q. And at the time of that introduction there was not a thing done on the farm by any one or all of those four men whom you have identified here this morning, was there, Mr. Kell?

A. That is correct.

Q. Yes, and was it after the meeting with Mr. Gettel that you acquired a new cousin by the name of Nilson, who was known as Ben?

A. After the meeting with Mr. Gettel.

Q. Yes.

A. Yes.

Q. What was your conversation with Mr. Gettel? What did you say to him and what did he say to you? That was at the very first meeting and at the very first introduction.

A. I don't remember.

Q. Did you tell Mr. Gettel what your suspicions were?

A. I didn't have to.

Q. Did Mr. Gettel tell you?

A. What my suspicions were?

Q. Yes.

A. No, I had made my report to Homer Casey.

Q. What report did you make to Homer Casey?

A. I merely told him of my various meetings.

Q. And that the barn was going to be erected and that a still was to be set up in the barn?

A. Yes.

Q. And it was after that that you met Mr. Gettel.

A. After I reported to Casey.

Q. Yes.

A. That's right.

Q. Did Mr. Gettel tell you to go ahead and permit these men to erect this barn and to go ahead with the still operation and accept the $300 a month rental and to permit them to put in this well, at that first meeting?

A. Mr. Gettel told me that providing I did nothing to entice them and encourage them in their going ahead with their plans it was all right for me to accept their agreement.

[fol. 94] Q. I see. What does "entice" mean, Mr. Kell?

A. I don't know—you can look it up in the dictionary.

Mr. Waldron: I think the witness should be qualified as an expert first.

Mr. Calandra: He uses the words "entice" and "encouragement."

Mr. Waldron: Yes, and he should be qualified as an expert if you are going to interrogate him on their meaning.

Mr. Calandra: He said he didn't know what it meant and that I should look in the dictionary.

Q. Do you know what "encouragement" means?

Mr. Waldron: I object.

The Commissioner: He can ask the witness what he understands the words "entice" or "encouragement" to mean. His definition may be wrong but every person has his own conception of what a particular word means.

Mr. Waldron: I will withdraw my objection.

A. I will be glad to qualify that. I would say the word "entice" means to lead on, encourage.

Q. And how did Mr. Gettel tell you to act and what did he tell you to say — Mr. Roett, alias Johnson, and these other men, at that first meeting with Mr. Gettel?

A. Mr. G[illegible] didn't tell me what to say.

Q. But he told you to go along with the Government.

A. Yes.

Q. And did he tell you that by going along with the Government that nothing could happen to you, that you couldn't or wouldn't be prosecuted?

Mr. Waldron: I object. That is not an issue at this time.

[fol. 95] Mr. Calandra: I am quoting Mr. Gettel. That was his testimony. Mr. Gettel said that and I am asking him what Gettel told him.

Mr. Waldron: Still what Gettel and this man said must be material to the issue. If an objection was not interposed

to what Mr. Gettel said at that time that was my fault but the testimony should not be permitted to go miles afield.

The Commissioner: I think that is true, Mr. Calandra. I think the witness has answered your specific question and I don't think it makes much difference what Mr. Gettel told this witness would happen to him.

Mr. Calandra: I will withdraw the question.

Q. What were Mr. Gettel's instructions to you after you had discussed with him this plan that these four men were going to erect a barn and therein operate a still?

A. His instructions were merely to keep Mr. Casey informed of developments.

Q. I see. Did Mr. Gettel say to you, "Now, Mr. Kell, you chase them away. Don't have anything to do with these people because by your permitting, your knowingly permitting a barn or still to be erected on the premises that you would be aiding and abetting in the commission of a felony or a crime against the Internal Revenue Laws of the United States of America"?

Mr. Waldron: I object to that as being leading. This witness is Mr. Calandra's own witness.

The Commissioner: Yes, I will sustain the objection.

Mr. Calandra: It merely requires a yes or no answer.

[fol. 96] Q. Did Mr. Gettel say to you anything at all relat- these people because by your permitting, your knowingly ing to the fact that any activity on your part would be understood by him and Homer Casey, the government agents?

A. I don't know what you mean by "understood."

Q. Did Mr. Gettel or Mr. Casey say to you, "Permit them to go ahead but don't tell them that you had spoken to me or to Homer Casey"?

. . . . . .

(The following question was thereupon read by the reporter:

"Q. Did Mr. Gettel or Mr. Casey say to you, 'Permit them to go ahead but don't tell them that you have spoken to me or to Homer Casey' "?)

The Commissioner: I will sustain the objection.

Q. What were Mr. Gettel's instructions to you?

Mr. Waldron: I object. He has testified to that.

The Commissioner: I think he is right. I believe Government's counsel is correct.

Q. What were Mr. Casey's instructions to you?

A. To keep him informed of developments.

Q. Did he tell you not to permit them to erect this barn or to permit them to put a still in there?

A. No.

Q. And at the time that you agreed to accept $300 a month rent from these four men for the use and occupancy of your farm you knew then that they were going to put a still in there and manufacture alcohol, did you not?

A. I did.

Q. And you reported that fact to Mr. Casey?

A. I did.

Q. And did you report that fact to Mr. Gettel?

A. Not to Mr. Gettel personally.

[fol. 97] Q. I see, and that was all reported by you, this rental agreement by these four men with you, to Mr. Casey, before the barn went up, before the still was set up and before the road was made and before the well was dug, is that right?

A. The agreement about the rental?

Q. Yes.

A. Your question refers to the agreement about the rental.

Q. In other words, you first agreed on the rent before they did a single thing in there, is that correct?

A. Yes.

Q. All right, and did you receive the rent?

A. No, not at that time.

Q. When did you first receive the rent?

A. Not until several months later.

Q. How much rent did you receive?

A. It was made in two payments. One during construction to aid in the construction and the last payment of $150 was made after the still became profitable.

Q. So in all you received but $300 in rental?

A. That's correct.

Q. Did you go down to the barn yourself to see how it was being constructed?

A. I aided in its construction.

Q. I see, why did you do that?

A. To get it the way I wanted it. I had that interest at heart.

Q. Did you tell that to Mr. Casey, that you were going to help erect the barn?

A. Yes.

Q. You did. All right. And was part of the arrangement with you, this rental arrangement, that when these people would move out of there the barn would be your property?

A. It wasn't discussed.

Mr. Waldron: I object. It is immaterial.

Mr. Calandra: He says the question never came up.

[fol. 98] Q. With reference to the well, what discussion was there with reference to the well?

A. The main concern was as to whether or not it would produce enough water.

Q. And did you think it would?

A. I didn't know.

Q. Now, you knew Mr. Nilson?

A. Yes.

Q. He is a Federal officer, is he not?

A. Yes.

Q. When did you first learn he was a Federal officer, Mr. Kell?

A. The first day he came to my house.

Q. When was that?

A. About the middle of February, I believe.

Q. And at the time neither of the four men had done any work in there in connection with the erection of the barn or setting up the still or making the road or the well, is that right?

A. No work was done.

Q. Did you have any talks with Nilson?

A. Yes.

Q. In February?

A. Yes.

Q. And who introduced you to Nilson?

A. Homer Casey.

Q. And what arrangements did you make with Nilson and Casey, if any?

A. The arrangements—I don't understand the question.

Q. What talks did you have with Casey and Nilson when you were first introduced to him?

A. Very little.

Q. Well, what did Nilson say to you—I will withdraw that. What did Casey say to you when he introduced you to Nilson?

A. I told Homer Casey that I was short of help and he told me, "Here is your new farm hand."

Q. And what name did he give you?

A. He told me it was Ben.

Q. Ben what?

A. He didn't give the last name, I don't believe.

Q. He told you then that Nilson was a Federal agent?

A. I don't believe he did.

[fol. 99] Q. How long after the first introduction did he tell you that Ben, the man who you were introduced to as Ben and whose right name is Nilson was, in fact, a Federal officer?

A. I am not sure he ever told me that in so many words.

Q. Were you told by anyone to introduce or to pretend that Nilson was a cousin to your wife?

A. I was never told to say that.

Q. Now, Mr. Nilson testified here two weeks ago that he was introduced to these men as a cousin of Mrs. Kell.

A. Yes.

Q. That is what he testified to here, under oath.

A. And that is definitely right. I introduced him that way but I wasn't told to do that.

Q. That was your own idea?

A. Yes.

Q. Did he work on the farm?

A. He sure did.

Q. For you?

A. That's right.

Q. Before any of these men came there to start this operation.

A. To start construction?

Q. Yes, to dig the well and start construction of the barn.

A. Yes, some time before.

Q. And what did he do for you?

A. Driving the tractor and hauling logs, and so on.

Q. Did you pay him?

A. I didn't.

Q. How long did he work for you as a farm hand before he quit you and went to work in this still, meaning Ben or Nilson?

A. Several weeks. Four or five weeks, possibly.

Q. And did it seem peculiar to you, Mr. Kell, to have a person work for you, drive a tractor and work on the farm all day, and not pay him?

Mr. Waldron: I object.

Mr. Calandra: I will withdraw the question.

Q. Did you agree when you hired Ben, alias Nilson, to pay him wages to work for you as a farm hand?

A. May I have the question repeated?

[fol. 100] (Question repeated.)

A. No.

Q. Why not, Mr. Kell? Come on, let's have it; we are looking for the truth no matter whom it hurts or helps. We can't help that.

A. I was never asked to pay him.

Q. Well, don't you pay your farm hands?

Mr. Waldron: I object to that as being immaterial whether or not this man pays his farm hands.

The Commissioner: Objection sustained.

Q. Who didn't ask you to pay him?

A. Who didn't ask me to pay him?

Mr. Waldron: I object to that as being immaterial.

Q. Who asked you not to pay him?

Mr. Waldron: Same objection.

The Commissioner: Objection sustained. I don't think that is in issue.

Q. As a matter of fact, he worked for you several weeks and he wasn't paid for that work by you.

Mr. Waldron: I object. This was all testified to before.

Q. When did he cease working for you as a farm hand?

A. I couldn't give you the exact date.

Q. Approximately.

A. The date when the still went into operation.

Q. Did he assist in the construction of the barn?

A. Yes.

Q. Did he assist you or did he assist these other boys whom you have identified here?

[fol. 101] A. In as much as he was living with me and had been helping me as a member of the family, he was there working for me, to look after my interests.

Q. You say, "as a member of the family." Explain that, please, that is not quite clear to my hazy brain this morning.

Mr. Waldron: I object.

The Commissioner: Objection sustained.

Q. In other words, he was a member of your family and he took an interest in seeing that the barn was constructed properly, is that correct?

A. That is correct.

The Commissioner: Can't you pin this thing down to specific facts, Mr. Calandra, of entrapment?

Mr. Calandra: I am leading up to that very quickly, Mr. Commissioner.

Q. For how long a period of time did you agree to rent that portion of your farm that was to have a barn erected on it and have a still in it, to make this illicit alcohol?

A. That agreement had no time limit.

Q. It was indefinite?

A. Indefinite. I do believe it was mentioned in the lease but the lease was not legal.

Q. You say the lease was not legal. Who told you that, Mr. Kell?

Mr. Waldron: I object.

A. Mr. Roett.

Q. Mr. Roett told you it was not legal?

A. That's right.

Q. But nevertheless you recognized these four people as your tenants and accepted the rental for the use and occupancy of your farm.

A. Yes, sir.

[fol. 102] Q. That's right. How many times had you spoken with Mr. Homer Casey? I will withdraw that. How many times had you spoken with Mr. Gettel since your first introduction?

The Commissioner: What difference does it make how many times he spoke to him? As I said before, we are not going into a trial here. Let us work on the assumption, which is borne out by the testimony, that he told Mr. Gettel once or twice or even ten times. What difference does it make? We can, I think, acknowledge the fact that the Government knew what was going on and knew it at various times from this witness but what difference does it make?

Q. And do you acknowledge that Mr. Gettel and Mr. Casey knew, Mr. Kell, prior to the erection of the barn exactly what was going to go on in there?

The Commissioner: He also testified to that. He said that Mr. Gettel knew.

Q. All right. Mr. Kell, did you know that you were violating the laws of the United States as well as the laws of the State of New Jersey by permitting, with your knowledge, a still to be operated on your property?

Mr. Waldron: I object.
The Commissioner: Objection sustained.

Q. Have you been arrested in this case at all, Mr. Kell?

Mr. Waldron: I object.
The Commissioner: Objection sustained.

Q. Do you know you are subject to indictment and trial for your activities in connection with knowingly permitting [fol. 103] this illicit still to not only be erected but be operated on your farm and to be prosecuted by both the United States and the State of New Jersey, the same as these other men?

Mr. Waldron: I object.
The Commissioner: Objection sustained.

Q. Were you deputized or sworn as a Federal officer by Mr. Gettel or Mr. Casey or any other Federal officer?

Mr. Waldron: I object.
The Commissioner: Objection sustained.
Mr. Calandra: That is a proper question.
The Commissioner: Why?
Mr. Calandra: Nilson went in there on this set up and we have a right to know it. Of course, Mr. Gettel said Mr. Kell had not been deputized and it is a perfectly innocuous question.
The Commissioner: I will allow it.
Mr. Calandra: May I have the question repeated.

(The following question was thereupon read by the reporter:

"Q. Were you deputized or sworn as a Federal officer by Mr. Gettel or Mr. Casey or any other Federal officer?")

A. No.

Q. Did you have any arrangements or agreements, and this requires a yes or no answer, with Mr. Gettel, Mr. Casey, Mr. Van De Car or Mr. Nilson, relating to what you were required to do as these men were erecting the barn and setting up the still and operating the still?

Mr. Chauncey Spering: I am the Special Investigator assigned to this case from Washington and I have just been sitting here and I have come to the conclusion that all Mr. Calandra is trying to do is to get the Government's case.

[fol. 104] The Commissioner: And you have his case, too.

Mr. Spering: We have a case, we don't need his case.

The Commissioner: Is there a question on the record and if there is what is the question?

(The following question was thereupon read by the reporter:

"Q. Did you have any arrangements or agreements, and this requires a yes or no answer, with Mr. Gettel, Mr. Casey, Mr. Van De Car or Mr. Nilson, relating to what you were required to do as these men were erecting the barn and setting up the still and operating the still?")

Mr. Waldron: I object to the question on the ground that it has been answered not once but three different times.

The Commissioner: I think that is correct, Mr. Calandra.

Mr. Calandra: Then there should be no objection to answering it again.

The Commissioner: Why clutter up the record?

Mr. Calandra: I am praying for it.

The Commissioner: That is not the question. The hearing should be conducted in an orderly manner.

Mr. Calandra: Very well.

Q. Didn't you, Mr. Kell, have an arrangement with the Federal agents, one or all of them, to permit these people to go on your property, erect this barn, operate a still in there, and that you were to keep reporting what you saw to Investigator Nilson who lived in your house? Did you have such an arrangement?

Mr. Waldron: May we break that question down and get a simpler version of it?

[fol. 105] The Commissioner: Let's have the question repeated.

(Question repeated.)

The Commissioner: I think the question is an integrated question and it can be answered in its present form.

Mr. Calandra: Let's have the question repeated.

(Question repeated.)

Mr. Waldron: May it be broken down just a little bit?

Mr. Calandra: Very well, I will rephrase it.

Q. Did you have an arrangement with Mr. Casey to report to him everything you saw each one of these men do on your farm?

A. I don't quite understand your use of the word "arrangement." I had instructions.

Q. What were the instructions?

A. To report.

Q. To whom?

A. Mr. Casey.

Q. Did you get similar instructions from Mr. Gettel?

A. No.

Q. Were you instructed—did you get similar instructions from Mr. Van De Car?

A. No.

Q. Do you know him?

A. I have met him.

Q. When did you first meet Mr. Van De Car?

A. The night of June 2nd, I believe.

Q. You mean the night of the raid?

A. That's right.

Q. That was June 3rd.

A. June 3rd.

Q. On the night of June 3rd whom did you see at your farm?

A. I saw Mr. Gettel, Mr. Van De Car and Mr. Casey.

[fol. 106] Q. And where did you see them?

A. I saw them get out of an automobile at the house.

Q. Did they talk with you?

A. They didn't have much to say.

Q. Well, what did they say and who said it, naming each one.

A. I don't remember. There was no general conversation.

Q. Did they say to you, "We are going down to raid this still tonight"? Did any one of the three agents say that to you?

A. No.

Q. Did you know what they were going to do there that night?

A. Yes.

Q. When did you know it?

A. When did I know it?

Q. Yes, when did you first learn it?

A. When I saw them.

Q. In other words, you suspected they were going to raid the still that night but you didn't know it?

Mr. Waldron: I object to that as calling for a conclusion.

The Commissioner: I will allow it.

Mr. Waldron: His suspicions are not involved in the case.

Mr. Calandra: I will withdraw it.

Q. Did Mr. Gettel say to you, "Mr. Kell, we are here tonight and we are going to raid the still." Did he say that to you?

A. No.

Q. Did Mr. Homer Casey say to you, "We are here tonight and we are going to raid the still"?

A. No.

Q. Did Mr. Van De Car say, "We are here to raid the still tonight"?

A. No.

Q. What did Mr. Gettel say to you?

A. I don't remember.

[fol. 107] Q. What did Mr. Casey say to you?

A. I don't remember.

Q. What did Mr. Van De Car say to you?

A. I don't remember.

Q. Did you talk with them very long?

A. No.

Q. How long?

A. It was a matter of seconds.

Q. Seconds. All right. Just excuse me for a minute—Did Nilson tell you they were going to raid the still that night?

A. Yes.

Q. When did he tell you that?

A. During the evening.

Q. Did he have his supper with you that night?
A. No.
Q. But during the course of the evening he told you that.
A. That's right.
Q. Just give us your best recollection of what words he used when he told you that.
A. He told me, "Tonight is the night."
Q. How did he come to put it that way to you?
A. I couldn't tell you that.
Q. Did you have previous conversations with him?
A. Yes.
Q. Relating to what was going on down there?
A. Yes.
Q. And were you down there at the still yourself?
A. No—at any time?
Q. Yes.
A. Yes, my stock was in the adjoining building.
Q. And you smelled the mash there?
A. Yes.
Q. And you knew the smell of mash?
A. Yes, I became acquainted with it.
Q. How long was this thing operating there?
A. Long enough for me to become acquainted with the smell of mash.
Q. Would you say you smelled mash three or four weeks before the raid?
A. Approximately that, yes.
Q. By the way, see if you can remember this, sometime around February or March, did you write a letter to Mr. Johnson, whom you know as Roett?
A. Yes.
[fol. 108] Q. What did you say in the letter, do you remember?
A. Yes.
Q. What was it?
A. It was brief and to the point.
Q. Well, what was it?
A. I addressed it to him and said I wanted to see him.
Q. And can you fix the time, the best approximate time that you can give us. I know I am going pretty far back.
A. As to the date of the letter?
Q. Yes.
A. I don't know, approximately the middle or end of February.

Q. But it was February, about the middle of February.
A. I don't know exactly.
Q. But it was in February.
A. I am not positive. My mind is very hazy on those dates and I can't be positive.
Q. But there is no doubt at all in your mind—I will withdraw that.

The Commissioner: Is this your only witness, Mr. Calandra?
Mr. Calandra: Yes.
The Commissioner: This is off the record.

(Discussion off the record.)

Q. Mr. Kell, did you ever talk with me about this case before I questioned you this morning?
A. The question was, did I ever talk to you about it?
Q. Yes.
A. Definitely not.

Mr. Calandra: I guess that is all.
Mr. Waldron: Commissioner, do you have any questions you would like to put to the witness?
The Commissioner: No.
Mr. Calandra: I am prompted by Mr. Roett who is an attorney, as you know, and I would like to ask a further question.
The Commissioner: Surely.
[fol. 109] Q. Why did you write Mr. Roett that letter in February 1946? What was your purpose?

A. Mr. Roett had asked me to either allow him to use part of the farm or to find him a place and I had decided perhaps it would be possible for him to use part of the farm.
Q. Your farm?
A. Yes.
Q. Was that letter written after you had talked and explained to Mr. Casey what these boys were going to put on your farm?
A. I'm not sure. I saw Mr. Casey on many, several occasions, but whether it was directly after——
Q. Was it during the time that you were seeing Mr. Casey that you wrote this letter to Mr. Roett?
A. Yes, it was during that time.

Q. And did you write that letter at the instruction or behest of Homer Casey; at the instruction, or request, or behest of Homer Casey?

A. No.

Q. But neither Homer Casey, nor Mr. Gettel, nor Mr. Van De Car, nor any other Federal agent gave you any instructions not to permit this illegal operation to take place in your barn, did they, Mr. Kell?

A. No.

Mr. Calandra: That is all.

Thank you. I am through for the day, gentlemen.

* * * * * * *

[fol. 110] IN UNITED STATES DISTRICT COURT

GOVERNMENT AFFIDAVIT OF HOMER CASEY

STATE OF NEW JERSEY,
County of Mercer, ss:

Homer Casey being duly sworn according to law upon his oath deposes and says:

1. I am an Investigator in the Alcohol Tax Unit and have been such an Investigator for about eighteen years. During the past six years I have been assigned to the District of New Jersey. During my employment as an Investigator of the Alcohol Tax Unit and the Prohibition Department I have seized and assisted in the seizure of a large number of stills at which non-tax paid alcohol was being produced. I am familiar with the smell of mash and with the noises usually heard around an illicit distillery. For a number of months prior to June 3, 1946 I was in communication with Investigator Nilsen concerning certain operations that were being carried on on the premises of the Kell Farm in Wall Township, Monmouth County, New Jersey, where Investigator Nilson was working under cover. I had visited the farm and also met Investigator Nilsen away from the farm premises about three or four times a week for a number of months prior to June 3, 1946, at which time we discussed the operations that were going on at said farm and the work he was doing. For a period

of about two weeks before June 3, 1946 I had a number of radio conversations with Investigator Nilsen. He gave me certain information by voice over the radio, which information I communicated to Investigator in Charge Oliver J. Gettel. As a result of a radio conversation with Investigator Nilsen on May 31 and information obtained from him which I transmitted to Investigator in Charge Oliver [fol. 111] J. Gettel a truck was seized containing 91—five-gallon cans of non-tax paid alcohol. The truck was seized in the vicinity of the Newark Airport. I did not take part in the seizure of the truck but after the seizure thereof I followed it into the Government warehouse where I found that the truck contained the 91 cans of non-tax paid alcohol. On the night of June 3, 1946 by pre-arrangement with Investigator Nilsen, I proceeded to the premises in the company of Investigator in Charge Oliver J. Gettel, and Investigator William Van DeCar. We were met about three miles from the Kell farm by Copeland Kell who then drove us in his car to his farm. As we left the main highway and proceeded along the dirt road on his farm leading to his farm buildings he stopped the car at some distance from his farm house and we got out of the car. At that point I detected a strong odor of fermenting mash and I heard the sound of the gasoline motor running. The noise of the motor and the odor of the fermenting mash appeared to come from a building off to one side, the roof of which could be seen from the point in the road where we stopped. Investigator Van DeCar went around one end of the building and I proceeded with Mr. Gettel around the other end of the building to arrest the persons who were then operating the plant which I knew from my experience in seizing illicit distilleries, aside from the information furnished me by Investigator Nilsen, was then being operated. As I approached the building the odor of mash became stronger and the noise of the gasoline motor became louder. I went around the side of the building through a cow lot and heard Investigator Van DeCar place Antonioli under arrest. I then went around to the front of the building and through the open door I saw a copper column, a large steam boiler and a cooker for the column. I also saw several five-gallon cans containing [fol. 112] alcohol. I later counted these cans and found there were 262 of them. I then entered the premises and saw the remainder of the distillery which included four large mash vats and other distillery equipment. At that time

Riordan Roett was not at the premises but a short time thereafter I heard him calling and as he approached, assisted by Investigator Van DeCar, placed him under arrest. I also arrested Sam Monticello sometime later.

Homer S. Casey.

Sworn and subscribed to before me this 10th day of February, 1947. Emma R. Hulit, Notary Public of N. J. My Commission Expires Oct. 26, 1947. (Seal.)

[fol. 113] IN UNITED STATES DISTRICT COURT

GOVERNMENT AFFIDAVIT OF BERTHOLD O. NILSEN

STATE OF NEW JERSEY,
County of Mercer, ss:

BERTHOLD O. NILSEN, of full age, being duly sworn, according to law, on his oath deposes and says:

I am investigator in the Alcohol Tax Unit, Bureau of Internal Revenue, assigned to the New Jersey District, and have been for about two and one-half years.

1. A number of months prior to June 3, 1946, I was assigned to work undercover at the premises of the Kell Farm, Wall Township, Monmouth County, New Jersey. I worked at the premises as a farm laborer and while there saw a number of men who later erected and operated an illicit distillery at the said premises. I assisted in the erection of the building which housed the illicit distillery; also in the erection of the still column and the vats which were used to ferment the mash.

2. While the distillery was in operation I assisted in unloading the raw materials, pouring the finished alcohol into five gallon cans and later in loading those cans on trucks. During this period I was in constant communication with investigators of the Alcohol Tax Unit, namely, Investigator in Charge, Oliver J. Gettel, under whose direction I was working, Investigator Homer Casey, Special Investigator Ralph Dell and Investigator William A. Van De Car. By prearrangement I would meet one or the other of the above named investigators at different times.

3. Up to about two weeks before June 3rd, I made all contact with the Investigators of the Unit, whom I would

meet at various places a number of miles from the Kell Farm. I also met District Supervisor John C. Palmer and [fol. 114] Assistant Supervisor in Charge of Enforcement Wilbur K. Bruner. At all these meetings the conversation would be about the still building I had assisted in erecting or about the illicit distillery that I was working at on the Kell farm. I also saw and talked with defendants, Anthony Antonioli, Richard Ricciardelli, Jack Trupiano, Andrew Todero, Riordan Roett and Nicholas Carbo, amongst others at the premises. On many occasions I had talked to these persons at the still premises prior to the seizure.

4. On May 20, 1946, I gave Investigator in Charge Gettel, samples of alcohol, several sugar bags, a yeast wrapper and an empty five gallon can which I took from the still premises. The alcohol was produced at the distillery.

5. On May 31st I helped load a truck, which I had previously identified to the investigators, giving the license number, the signs on the truck and the description thereof, with 94 five gallon cans of alcohol. After assisting in loading this truck I proceeded to the farm house where I was staying, about 225 yards from the still building and where I had a radio set and radioed information to Investigator Homer Casey as to the loading of the truck with alcohol and identified the truck to him. I later saw the truck, which had been seized at the government warehouse in Newark, New Jersey. On June 3, 1946, I radioed out the information to the investigators that two of the principals, Antonioli and Roett were at the still premises and that we were waiting for a truckload of sugar. I had another radio conversation with investigator in charge Gettel, sent Copeland Kell out to the road at a point about three miles from the farm to meet Investigator Van De Car. This radio message and conversation with Investigator in Charge Gettel occurred about 11:15 or 11:30 p. m. The pump was in operation at the time and was pumping water into the vats being driven by the gasoline engine when I observed Investigator [fol. 115] Van De Car enter the premises. I was sitting in front of the building, adjacent to the door and hearing the noise to my right, looked and recognized Investigator Van De Car coming along the side of the building and I stayed there until he entered the building and I heard him arrest Antonioli. Investigator Van De Car did not see me because I was on the other side of the light and I left the still building and went across the hill where I met Investigator Casey

and Investigator in Charge Gettel. Then I went back to the Kell farm house.

6. Earlier in the evening on June 3 Roett had a gun in a pocket of his jacket. I saw him take the gun from the jacket and slip it in his pocket. In my radio conversation with the other investigators I furnished information that Roett was armed.

7. Earlier the next morning at about daybreak Special Investigator Dell and I were looking for the gun and I saw Investigator Dell find the gun, which I recognized as being Roett's. The gun was fully loaded. Dell took the shells out in my presence.

8. At the time that I left the building at approximately 11:30 P. M. Antonioli was engaging himself in replenishing the fuel of the gasoline engine which was attached to the pump used to pump water to cook the column and pump water into mash vats.

Berthold O. Nilsen.

Sworn and subscribed to before me this 10th day of February, 1947, Emma R. Hulit, Notary Public of N. J. My Commission Expires October 26, 1947.

[fol. 116] IN UNITED STATES DISTRICT COURT

GOVERNMENT AFFIDAVIT OF OLIVER J. GETTEL

STATE OF NEW JERSEY,
County of Mercer, ss:

OLIVER J. GETTEL, Investigator in Charge, Alcohol Tax Unit, Internal Revenue Bureau, Treasury Department, at Hartford, Connecticut, formerly of Newark, New Jersey, who has been connected with the Government for approximately twenty years, of full age, being duly sworn according to law upon his oath deposes and says:

1. Having received reliable information that a distillery might be erected on the Copeland Kell farm, Allenwood, Monmouth County, New Jersey, I selected Investigator Berthold Nilsen, on February 15, 1946, to act in an under-cover capacity as a farm hand. Accordingly, he reported to Investigator Casey, who in turn took him to the Kell farm. In a conference with Investigator Nilsen I spe-

cifically instructed him that he was not to entice, encourage, or make any propositions or suggestions of any kind, that he was to act merely as a dumb farm hand and that after he was propositioned to become an employee and a still worker that he should accept and play the part thereof. He was instructed to keep a detailed written memorandum or diary of each day's happenings by time, place, date, conversations, (with whom), weather conditions and any pertinent information in regard to activities. Investigator Nilson in person, and through Investigator Casey, made periodic reports on the developments happening on the Copeland Kell farm. The progress of erecting the distillery was commenced by cutting a roadway into the wooded areas on the Kell farm, making a well, building a new building to house the distillery, erecting a distillery column within the building, beginning of the operation of making alcohol on May [fol. 117] 13, 1946. On May 16, 1946 Investigator Casey turned over to me the su. of $125.00 which had been received by him from Investigator Nilsen as wages for working for the syndicate in constructing and erecting the illicit distillery on the Copeland Kell farm. On May 20, 1946, accompanied by Investigator Casey, District Supervisor J. C. Palmer, and Chief of Police Legg of Brielle, New Jersey, I had a conference with Investigator Nilsen and Copeland Kell at the home of Nilsen's father in Laurelton, New Jersey. At the time Investigator Nilsen turned over to me samples of alcohol that he had taken from the various runs which had thus far been made, together with an empty sugar bag and an empty five gallon can, which he had brought from the distillery. On May 26, 1946 I assigned Investigators Van De Carr and Special Investigator Dell to begin observation of the activities of the persons and trucks and automobiles they were using to take commodities to the still and to remove the finished product therefrom. These officers were assigned to use radio two way cars in connection with their conversations and accordingly the two way portable radio set was dispatched through Investigator Casey to Investigator Nilsen to be placed on the Kell farm so that contact could be made by air to the radio cars on the outside. Many contacts were made by air during the course of the investigation. I became acquainted with the persons appearance of trucks and automobiles used by the persons operating the distillery. Two large trucks, one XK-8632 1946 registration which had painted

on the side of inscription "Hilltop Dairy Products" and another truck, a Ford, with the inscription on the side of the door, "J. & M." truck, bearing license No. XK-8633. I continued to receive reports from Investigator Nilsen and Investigator Casey and on May 31, 1946, Friday), about 6:00 P. M., I received information that the J. & M. truck, above described, was leaving the still cite at Allenwood, New Jersey, Investigator Casey stating that it was [fol. 118] loaded with 94 cans of alcohol. I immediately proceeded from my home to Newark, New Jersey, where I picked up Investigator Fox and we proceeded to a point on Route 25 and 1, south of Newark, near the Avenel diner, in Avenel, New Jersey, to await the arrival of the truck XK-8632, bearing the inscription "Hilltop Dairy Products" on the side of the body. This truck appeared and was driven within the corporate limits of Newark, New Jersey. At Haynes Avenue the driver of the truck pulled into the entrance of the Newark Airport and was attempting to go on the other fork of the road into Haynes Avenue. At this point I drove the government truck and blocked the same. Sam Monticello was driving the truck. I asked him to alight therefrom and further requested that he open the door of the truck which was locked with a padlock. He informed us that he did not have the key for the truck nor did he know what was in the truck. Thereupon he was asked to place the contents of his pockets on the running board of the truck and among his possessions was a key that fit the lock on the rear doors of the truck. After unlocking the padlock and opening the doors therein I found a number of cans and upon examining the same found they contained alcohol. Sam Monticello was placed under arrest. The truck was taken to the government warehouse and stored therein. The arrested person was placed in the City jail at Newark, New Jersey. On June 3, 1946 I, accompanied by Investigator Van De Car, Casey and Special Investigator Dell, was in the vicinity of Allenwood, New Jersey, about 9.00 P. M. Investigator Nilsen contacted me by radio and reported the still operators being present awaiting the arrival of a load of sugar, that there was about 250 cans of alcohol at the still, that the alcohol was to be taken away from the farm upon the arrival of the sugar truck. He informed me that he would contact us when the truck left the still with the load of alcohol. We waited with the radio [fol. 119] receivers open until about 11:00 P. M. when Inves-

tigator Nilsen radioed that the truck they had (meaning the still workers) been waiting for had been delayed. I ascertained from Investigator Nilsen the name of the men at the still at that time. He informed me that Roett, alias Johnson and Tony Antonioli were at the still with him. I asked Investigator Nilsen if he would be able to come out and pick up Investigator Van De Carr and Investigator Casey and myself. Investigator Nilsen replied that he could not but that he would have Mr. Kell come out for us immediately. Accordingly, Mr. Kell picked us up at the designated spot. Investigator Van De Carr and Investigator Casey accompanied me in Mr. Kell's car, driven by Mr. Kell, to his farm where he drove into the lane thereon. As we were being driven down the lane before arriving at the house I could smell fermenting mash and hear a gasoline motor running on the right hand side coming from the newly erected still house which had previously been described to myself. After alighting from the automobile Investigators Van De Car and Casey and myself, directed by Mr. Kell, started toward the building housing the still. As we approached the building the odor of fermenting mash could be detected and became stronger the closer we came to the building. I instructed Mr. Kell to take Investigator Van De Carr around the south end of the still house for the purpose of stationing him there so that he could enter the still house door which was on the easterly side of the building. After Mr. Kell had stationed Investigator Van De Carr he came back to Investigator Casey and myself and showed us how to go around the north of the still house for the purpose of entering same. At that point Mr. Kell left Investigator Casey and myself. As I was about to crawl over the rail fence or partition, I met Investigator Nilsen on the other side. I shook hands with him and he informed me that Investigator Van De Carr had already apprehended Tony in the still house. I proceeded immediately to the small truck setting in the cleared space in [fol. 120] front of the still house for the purpose of apprehending the occupant thereof. Upon my arrival I found that Roett, who I was informed occupied this truck, had escaped temporarily. I then proceeded to the still house to assist Investigator Van De Car and found that he had in his custody one Tony Antonioli. I then returned to the truck and searched it thoroughly for papers and things of an evidenciary nature. I then instructed Investigator Casey

to take the truck and drive to the highway for the purpose of seeing if, that Roett, who had escaped, could be seen on the road or in the vicinity. I remained in the open a portion of the time thereafter when I noticed headlights on the lane leading into the farm. This vehicle turned from the lane into the road leading to the still house. When about halfway to the still house I could ascertain that it was a small truck returned, driven by Investigator Casey. About the time Investigator Casey brought the truck to the end of the road I heard a voice calling from the woods "Hey, Tony", "Hey, Tony". Upon hearing this voice I quickly rushed into the still house and caused Tony, the prisoner, to answer the call which he did. I then asked him to tell his partner to come on up to the still house, which he refused to do. I then left the still house, instructed Investigator Casey to turn off the motor and lights of the truck and to be very quiet. I ordered Investigator Casey to proceed around to the side and later Investigator Casey apprehended Roett and with the assistance of Investigator Van De Car brought him in. We later arrested other persons at the distillery which we found to be a complete distillery.

Oliver J. Gettel.

Sworn and subscribed to before me this 10th day of February, 1947, Emma R. Hulitt, a Notary Public of N. J. (Seal.)

[fol. 121] IN UNITED STATES DISTRICT COURT

GOVERNMENT AFFIDAVIT OF WILLIAM A. VAN DE CAR

STATE OF NEW JERSEY,
County of Mercer, ss:

William A. Van De Car, of full age, being duly sworn according to law, deposes and says:

1. I am an investigator in the Alcohol Tax Unit, of the Bureau of Internal Revenue and have been such an investigator for 18 years. During the past 6 years I have been assigned to New Jersey, being stationed in Trenton. During the past 18 years I have seized and assisted in the seizure of many illicit distilleries at which non-tax paid alcohol was produced. I am familiar with the smell of mash

and have seized and assisted in the seizure of many thousands of gallons of mash.

2. On the night of June 1, 1946, I proceeded to the vicinity of the Kell Farm, Wall Township, Monmouth County, New Jersey, where I had information that an illicit distillery was operating. About three miles from the Kell Farm, on the road, I met and talked to Investigator Nilsen with whom I had a conversation concerning a still that was then and there being operated on the premises, where he was working undercover. At the time we also had a conversation concerning a truckload of alcohol that was seized near the Newark Airport.

3. On the night of June 3, 1946, accompanied by Investigator in Charge Oliver J. Gettel, Investigator Homer Casey and Mr. Copeland Kell, the owner of the farm, in a car being driven by Mr. Kell, we proceeded to the Copeland Kell Farm. Mr. Kell picked us up about three miles from the farm, drove the car into a road leading into the farm premises and stopped the car at a point. At that point I got out of the car and at that time I detected a strong odor of mash and heard he noise of a gasoline motor pumping [fol. 122] something. The smell and pumping were familiar to me and indicating to me that a distillery was there and that some operation was being carried on. In numerous other distilleries I have seized I have smelled similar odors and have heard similar noises.

4. From the point in the road where we stopped I could see the roof of a building. I proceeded toward the building from which the noise was coming to arrest whoever was found at the premises operating the plant and to seize and to assist in the seizure of the said plant. As I came closer to the building the noise became louder and the smell became stronger. I proceeded around the building and through an open door saw a person whom I later found to be one Antonioli. I could see a still column to my right as I looked in this door and to the left I observed the pump where the noise was coming from. I also saw a steam boiler upright. The interior of the still premises was poorly lighted, these lights coming from two, large flashlight, electric lamps that were shining on the tin, throwing a reflection over the interior of the premises. I placed Antonioli under arrest and seized the illicit distillery.

5. After arresting Antonioli and seizing the place I observed a large number of five gallon cans which I later found contained alcohol and vats which contained fermenting mash. A few minutes later I assisted Investigator Casey in arresting Riordan Roett outside of the building.

William A. Van De Car.

Sworn and subscribed to before me this 10th day of February, 1947. Emma R. Hulit, Notary Public of N. J. My Commission Expires Oct. 26, 1947. (Seal.)

[fol. 123] IN UNITED STATES DISTRICT COURT

Appearances:

Edgar H. Rossbach, Esq., United States Attorney, by John A. Waldron, Esq., Assistant United States Attorney.

Samuel Cohen, Esq., of Counsel, Attorneys of United States.

Anthony A. Calandra, Esq., Attorney of Petitioners.

OPINION—Filed March 4, 1947

FORMAN, Judge:

The government filed a complaint against the defendants, petitioners herein, charging violation of the Internal Revenue Laws. The petitioners moved to suppress certain evidence held by the government against them, claiming that since it was obtained without a search warrant their constitutional rights were invaded. For the purpose of the motion affidavits were submitted by the government, and the petitioners offered the record of the preliminary examination before the United States Commissioner.

In January, 1946 the petitioners leased part of the Copeland Kell Farm, located in Allenwood Township, New Jersey, and they agreed to construct a roadway, a barn, dig a well and pay a monthly rental. The lessor, Kell, was suspicious and reported these facts to the government. Kell permitted the defendants to proceed with their plans, and, in fact, the government planted an agent on the premises. A still was constructed which began to operate about three

weeks prior to the night of a raid by government agents on June 3, 1946. Production was at the rate of 400 to 500 gal-
[fol. 124] lons a day. As a result of information produced by the government's secret agent, a truck containing 91 five gallon cans of alcohol was seized May 31, 1946. On information from the same source that the principals were present at the still, the government made a raid upon the premises on the night of June 3, 1946.

On approaching the farm the government agents detected a very strong odor of fermenting mash, heard a motor running and saw a still through the unclosed barn door. Fire in the boiler was banked, and the still was not in operation at the time. Government agents arrested petitioners on the premises and found several hundred cans of alcohol. The petitioners alleged that the still, alcohol, mash and other equipment were unlawfuly seized without a search warrant. The barn was about 200 yards from the house in which Kell lived.

Petitioners argue that the conduct on the part of the government not only amounts to entrapment which is not complained of on their motion, but that the same facts show that the government had information at hand sufficiently early for it to have procured a search warrant. The rule relied upon by petitioners was set forth in the case of *Taylor* v. *U. S.*, 286 U. S. 1 (1932). In that case Taylor was charged with unlawful possession of whiskey. A motion to suppress was made on the ground that evidence was seized from the garage adjacent to petitioners residence without a warrant. There was an odor emanating from the garage, but no one was within the place. While the search progressed Taylor came from his house and was put under arrest. The court stated:

"Although over a considerable period numerous complaints concerning the use of these premises had been received, the agents had made no effort to obtain a warrant for making a search. They had abundant oppor-
[fol. 125] tunity so to do and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility."

> Prohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees against unreasonable search. This record does not make it necessary for us to discuss the rule in respect of searches in connection with an arrest. *No offender was in the garage; the action of the agents had no immediate connection with an arrest. The purpose was to secure vidence to support some future arrest.*" (Italics supplied.) 286 U. S. 1, 6.

To the above authority petitioners have added *In re Milburne*, 77 F. 2d 310 (2 Cir., 1935) and *U. S.* v. *Edelson*, 83 F. 2d 404 (2 Cir., 1936) for the proposition that where the government agents have ample opportunity to procure a search warrant they must do so. These cases relied upon the *Taylor* case, *supra*.

In this Circuit in the case of *Pong Ying* v. *U. S.*, 66 F. 2d 67, the court stated that the Supreme Court has not varied the law of the right to search without warrant when a crime is being committed in the presence of government officers. Therein, the government had information that opium was being smoked at the premises in question, and narcotic agents proceeded to the place where they smelled fumes from burning opium, heard voices inside, and gained [fol. 126] admission by breaking the door. They searched the premises without a warrant, and obtained evidence against the defendant. On motion to suppress the evidence, the court observed that there was no constitutional privilege, and that the narcotic officers would have been derelict in their duty had they not acted promptly and effectively to enter and search the apartment. In *Strauss* v. *U. S.*, 66 F. 2d 786 (3 Cir., 1933), the court stated that the officers had reasonable grounds for believing the distillery was then being operated, and it was their duty to enter, and that the lower court was right in refusing to suppress the proofs of lawbreaking found therein.

In the case of *U. S.* v. *Feldman*, 104 F. 2d 255 (3 Cir., 1939), the court quoted with approval the syllabus in *Rocchia* v. *U. S.*, 78 F. 2d 966, as follows:

> "Officers who detected strong odor of fermenting mash and distillation, and who heard still in operation before entering building, had reasonable cause for

believing that crime was being committed in their presence and could enter building and arrest defendant without first obtaining warrant, and as incident thereto could search premises and seize property used in commission of crime." 104 F. 2d 255, 257.

Cases in this Circuit bearing on this problem were reviewed in *U. S.* v. *Esposito*, 45 F. Supp. 39 (E. D. Pa. 1942), wherein government agents who made the search and seizure complained of had had the garage under observation from July 30 to November 13, 1941, the date of the arrest. The court stated:

> "If the facts observed by the government agents were such as to justify a reasonably prudent person in [fol. 127] believing that the law had been or was being violated in the premises afterward searched, then there was probable cause for the search and seizure, and the petitions should be denied—and vice versa." 45 F. Supp. 39, 40.

The government agents herein were not pressed for time but we do not think that their failure to procure a search warrant during this period requires the suppression of the evidence they found. They were drawn to the scene of the alleged crime by one of their own number allegedly working with the suspects. This was good policemanship and efficient crime detection. They were obviously waiting for the proper moment to strike. Before their entry they smelled the distinctive odors, saw the still, and heard a motor running. They apprehended the defendants involved and placed them under arrest. The test of reasonableness that must be applied in all such cases results in the disclosure of no fracture of the defendants' constitutional privileges and the motion to suppress will be denied.

[fol. 128] IN UNITED STATES DISTRICT COURT

ORDER DENYING PETITION TO SUPPRESS EVIDENCE—March 29, 1947

ORDER

On the 10th day of February, 1947, this cause came on for argument before this court at the conclusion of which opinion was reserved.

On March 4, 1947, there was filed in this court an opinion denying the petition to suppress, based on reasons set forth in the said opinion.

It is, therefore, ordered that the petition to suppress be and the same is hereby denied and that this Order be entered upon the records of the Clerk of the United States District Court at Trenton, New Jersey, and an exception hereto is noted for petitioners.

Forman, Judge, United States District Court.

Dated: March 29, 1947.

I hereby consent to the entry of the above Order to form only.

Anthony A. Calandra, Attorney for Petitioners.

[fol. 129] IN UNITED STATES DISTRICT COURT

STIPULATION IN LIEU OF DESIGNATION OF CONTENTS OF RECORD ON APPEAL—April 9, 1947

It is hereby stipulated and agreed between Anthony A. Calandra, Esquire, attorney for Jack Trupiano, Romildo Riccardelli, Anthony Antoniole and Riordan J. A. Roett, Jr., defendant-appellants, and Edgar H. Rossbach, United States Attorney for the District of New Jersey and John W. Waldron, Assistant United States Attorney, that the following shall constitute the contents of the record on appeal, and this stipulation is in lieu of a Designation of the Contents of the Record on Appeal, to wit:

1. Petition to Suppress Evidence.
2. Testimony taken before United States Commissioner Gustave Goldstein.
3. Affidavits of Oliver J. Gettel, Homer Casey, William A. Van De Car, and Berthold O. Nilsen.

4. Opinion of the Trial Court.
5. Order denying the prayers of the petition.
6. Assignments of Error.

Dated: April 9th, 1947.

Anthony A. Calandra, Attorney for Defendant-Appellants. Edgar H. Rossbach, United States Attorney. John W. Waldron, Assistant United States Attorney.

[fol. 130] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR

And Now Comes, Jack Trupiano, Romildo Riccardelli, Anthony Antoniole and Riordan J. A. Roett, Jr., defendants-appellants, and say that in the record, proceedings and judgment aforesaid, there is manifest error, and for assignment thereof, say that:

1. The learned Trial Court erred in denying defendant-appellants' petition to suppress certain evidence seized by agents of the Alcohol Tax United and intended to be used against them in violation of their constitutional rights.

2. The learned Trial Court should have granted the prayers of defendant-appellants' petition to suppress the evidence claimed to have been illegally obtained and seized and intended to be used against defendant-appellants in contravention of their constitutional rights.

3. That the government agents should have obtained a search warrant prior to making any search and seizure of the evidence intended to be used against defendant-appellants.

4. That the Order denying the petition to suppress the evidence made by defendant-appellants is contrary to law.

Wherefore, the defendant-appellants, Jack Trupiano, Romildo Riccardelli, Anthony Antoniole and Riordan J. A. Roett, Jr., pray that the judgment herein for the errors aforesaid, in the record and proceedings herein, may be reversed and annulled, and altogether for nothing holden, and they may be restored to all things which they have lost by reason of said judgment.

Anthony A. Calandra, Of Counsel with Defendant-Appellants.

[fol. 131] Anthony A. Calandra, Counsellor at Law, 31 Clinton Street, Newark, New Jersey

Zone 2

Oct. 1, 1947. Suggestion Approved. Biggs, J.

September 29th, 1947.

Hon. John Biggs, Jr., President Judge, U. S. Circuit Court of Appeals, United States Court House, Philadelphia, Pennsylvania.

Re: U. S. vs. Trupiano, et als.

My dear Judge Biggs:

I have been advised by Miss Ida O. Creskoff, that the argument in the above appeal cannot be heard on any other day excepting October 7th, 1947, because of the nature of the calendar.

October 7th, 1947 is the opening day of the New Jersey Supreme Court at Trenton, and I have been served with a motion by the Prosecutor of the Pleas of Essex County, New Jersey, to dismiss an appeal which I undertook for one Mollie Levin, who pending the decision of the Supreme Court, died. It is the Prosecutor's contention that death abates an appeal where death occurs prior to the rendering of an appellate decision. Argument and briefs were submitted at the May, 1947 Term and the Supreme Court reserved decision and Mrs. Levin died in June, 1947. This is the first time such a situation has arisen in our courts and the points raised on this appeal are of public interest as well as of interest to the bench and bar of our State. I am opposing this motion to dismiss on several grounds. The motion is returnable, as I have indicated on October 7th, 1947, and the very same day that I am to argue the Trupiano, et als., appeal in your Honor's court.

Frankly, my oral argument in the Trupiano case will not and could not amplify my position any more than I have submitted in my Brief. I am confident that I could do nothing more than to orally emphasize what I have already argued in my Brief.

[fol. 132] With this in mind, I communicated with the Hon. Edgar H. Rossbach, United States Attorney for New Jersey, asking his views concerning oral argument. Mr.

Rossbach is agreeable to submitting both sides by the Briefs respectfully submitted by each of us without oral argument, if agreeable to your Honor, and has authorized me to so advise you.

I have no desire whatever to delay the decision in the Trupiano, et als., appeal, and hope that by submitting the appeal, on Briefs, will meet with your approval.

Assuring you, always, of my utmost esteem and highest personal regard, I am,

Very respectfully yours, —— ——.

Endorsements: Request to Submit Case on Briefs Approved. Received & Filed Oct. 1, 1947. Ida O. Creskoff, Clerk.

[fol. 133] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1947

No. 9394

UNITED STATES OF AMERICA

v.

JACK TRUPIANO, ROMILDO RICCARDELLI, ANTHONY ANTONIOLE and RIORDAN J. A. ROETT, JR., Appellants

Appeal from the District Court of the United States for the District of New Jersey

And now, to-wit: this 6th day of October A. D. 1947, it is ordered that Hon. Albert Lee Stephens, U. S. Circuit Judge, for the Ninth Circuit, be, and he is hereby assigned to sit in above case in order to make a full court.

Biggs, Circuit Judge.

Endorsements: Order Assigning Hon. Albert Lee Stephens for Argument, etc. Received & Filed Oct. 6, 1947. Ida O. Creskoff, Clerk.

[fol. 134] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1947

No. 9394

UNITED STATES OF AMERICA

v.

JACK TRUPIANO, ROMILDO RICCARDELLI, ANTHONY ANTONIOLE and RIORDAN J. A. ROETT, JR., Appellants

On Appeal from the United States District Court for the District of New Jersey

Submitted October 6, 1947

Before Biggs, Albert Lee Stephens and Maris, Circuit Judges

OPINION OF THE COURT—Filed October 7, 1947

Per Curiam:

The order of the court below will be affirmed.

A true Copy: Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 135] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1947

No. 9394

UNITED STATES OF AMERICA

vs.

JACK TRUPIANO, ROMILDO RICCARDELLI, ANTHONY ANTONIOLE and RIORDAN J. A. ROETT, JR., Appellants

Present: Biggs, Albert Lee Stephens and Maris, Circuit Judges.

On Appeal from the District Court of the United States for the District of New Jersey

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this case be, and the same is hereby affirmed.

October 7, 1947.

By the Court, Biggs, Circuit Judge.

Endorsements: Order Affirming Order of District Court. Received & Filed Oct. 7, 1947. Ida O. Creskoff, Clerk.

[fol. 136] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Sct.:

I, Ida O. Creskoff, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Appellants' Brief, containing the printed portions of the record; and proceedings in this Court, in the case of United States of America vs. Jack Trupiano, et al., Appellants, No. 9394, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 27th day of October in the year of our Lord one thousand nine hundred and forty-seven, and of the Independence of the United States the one hundred and seventy-second.

Ida O. Creskoff, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 137] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 15, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 52,657. U. S. Circuit Court of Appeals, Third Circuit, Term No. 427. Jack Trupiano, Romildo Riccardelli, Anthony Antoniole and Riordan J. A. Roett, Jr., Petitioners, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed November 5, 1947. Term No. 427 O. T. 1947.

FILE COPY

Office - Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY
Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 427

JACK TRUPIANO, ROMILDO RICCARDELLI, ANTHONY ANTONIOLE AND RIORDAN J. A. ROETT, JR.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FRANK G. SCHLOSSER,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 427

JACK TRUPIANO, ROMILDO RICCARDELLI, ANTHONY ANTONIOLE AND RIORDAN J. A. ROETT, JR., *Petitioners,*

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered October 7, 1947, which affirmed the order of the district court dismissing a petition filed before indictment to suppress as evidence things seized by agents of the Alcohol Tax Unit of the Treasury Department without warrant and in violation of the Fourth and Fifth Amendments.

Opinions Below

The Circuit Court of Appeals affirmed without opinion (R. 133). The opinion of the district court (R. 123-127) is reported in 70 Fed. Supp. 764.

Jurisdiction

The judgment of the circuit court of appeals was entered October 7, 1947 (R. 134), and this Petition is filed November 5, 1947. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the act of February 13, 1925 (28 U. S. C. A., Sec. 347).

Appealability of Judgment

Appeal will lie in proceedings before indictment to suppress evidence illegally seized. Such proceedings are independent actions undertaken before institution of the criminal case as such. *Go-Bart Importing Company v. United States*, 282 U. S. 344, 356; *Burdeau* v. *McDowell*, 256 U. S. 465; *Perlman v. United States*, 247 U. S. 7, 13. In the court below the Government stated that it did "not question the appealability of the decision in view of *In re Sana Laboratories, Inc., et al.*, C. C. A. 3, 115 F. 2d 717 and *Cheng Wai* v. *United States*, C. C. A. 2, 125 F. 2d 915."

Questions Presented

Whether revenue officers have power, despite the mandate of the Fourth Amendment, to act without search warrant under a situation in which the Government possessed full prior knowledge of the *corpus delicti*, opportunity to obtain the warrant and ample time within which to seek it.

Whether search and seizure in such circumstances is unconstitutional.

Statement

After their arrest, but before indictment, petitioners applied to the district court under Rule 41(e) of the Rules of Criminal Procedure (1946) for return of property taken and suppression of evidence on the ground that the same was illegally seized without warrant (R. 2-4). This is the practice sanctioned by precedent and the new rules. *In re*

Fried, C. C. A. 2, 161 F. (2d) 453, 458, note 1 collecting the cases. In cases of the present type involving contraband property which cannot be returned, the purpose and effect of the motion is to secure restraint against use as evidence rather than actual return of the contraband articles.

In the district court for the purpose of the motion affidavits were submitted by the Government and petitioners offered the record of the preliminary examination before the United States Commissioner taken at Asbury Park, in the county in which the search and seizure were effected.

The Government did not claim that circumstances prevented the obtaining of a warrant, but offered as sole justification for the action the fact that crime was being committed in the presence of the revenue officers, for which reason search and seizure were said to be proper as incident to a lawful arrest on view. The petitioners showed that the Government possessed full prior knowledge of the continuing *corpus delicti* incident to operation of an illicit still, opportunity to obtain warrant from the judicial department and ample time within which to seek it, but had deliberately refrained from obtaining any warrant; they maintained that for such nonfeasance the acts of the revenue officers were unreasonable and in violation of the Fourth and Fifth Amendments.

The evidence on the motion came from the government officers and from Kell, the informer. It was not in conflict and showed the following facts: in January, 1946, petitioners sought to lease part of the Kell farm located in Allenwood Township, Monmouth County, New Jersey. Kell, suspicious of their motives, reported the matter to the Government but was permitted to accept the offer provided he would cooperate with the Treasury Department and keep them informed of all developments (R. 78-80, 85-87, 91-96). In mid-February the Government arranged with Kell to receive Alcohol Tax Unit Investigator Nilson

on the farm in the disguise of a farm hand, whereupon Nilson appeared on the premises and performed farming operations for Kell until June 3, the date of the raid (R. 44, 98-101, 116). Toward the end of March Kell leased part of his farm to petitioners and introduced Nilson to them as a relation of Mrs. Kell. Under instructions of his superiors, Nilson then became an employee of petitioners and, with Kell, assisted in erecting barn and still, accepting money for his labor and turning it over to the Government, at the same time keeping his superiors constantly informed concerning progress in erecting the still.

The still commenced to operate on May 13 and Nilson thereafter worked as mash man for $100 a week, assisting daily in the operation of the plant and making prompt and frequent reports to his superiors in the Treasury Department (R. 58-72, 113-114, 116-117). The Government permitted the still to be operated for three weeks, from May 13 to June 3, at which latter date the premises were raided. During this period Nilson assisted daily in the production of alcohol (R. 70). On May 20 Nilson personally conferred with his superiors, reported in full detail and turned over to them samples of each run of alcohol (R. 114, 117).

At this time the still had been in full operation for one week and, through Nilson, the Government was in complete possession of every detail in the case, including identity of the principals. Thus on May 20 and thereafter the Government had ample evidence on which to apply for a warrant. It has never claimed otherwise. No warrant was sought (R. 75).

On May 26 a radio set was dispatched to Nilson through other revenue officers and he used this device to transmit frequent bulletins to his superiors (R. 117). Again no warrant was applied for, although the evidence was more than ample to permit seeking one. On May 31, on radio intelli-

gence supplied by Nilson, a motor vehicle loaded with 94 five-gallon cans of alcohol was seized by the Government at Newark, New Jersey, about an hour after it had left the farm. The driver was arrested (R. 114, 117-118).

The seizure of truck and alcohol took place some 76 hours before the raid, yet in all the intervening time the Government made no effort to obtain a warrant. The Alcohol Tax Unit operates out of Newark, in which city district court judges sit daily and a United States Commissioner is always available; another is available at Asbury Park, Monmouth County, a twenty minute drive from the Kell farm. Future events disclosed that the revenue officers never intended to obey the mandate of the Fourth Amendment and that they purposed to act without putting the matter before the judicial department. There could have been no difficulty in obtaining the warrant, the evidence being in possession of the Government, but again the Government deliberately avoided seeking any warrant.

On June 3 Nilson radioed that two of the principals were at the still and that a load of sugar was due to arrive (R. 114, 118-119). Nilson knew then that the raid would be made that night, for he told Kell that "tonight is the night" (R. 107). The raid took place shortly before midnight, entirely without warrant (R. 15), although one could easily have been obtained. Indeed, the drama of the midnight descent of the revenue men on the still would have been perfectly possible and lawful under the warrant, for the Government had positive evidence in its possession through Investigator Nilson that the still, mash and equipment were in the place to be searched. 18 U. S. C. A., Sec. 620.

The actual raid was carefully planned and well executed by very skillful officers who, tongue-in-cheek, asserted that the odor of mash led them to suspect operation of a still and that, through an open door of the barn, they ob-

served the still, fires banked, and one of the petitioners, Antoniole, in the barn (R. 10-11). Arrest on view followed and in turn was followed by search and seizure.

The facts showed, however, that the elaborate actions of the raiding party were mere deception amounting to nothing more than self-serving declarations designed to simulate an emergent arrest necessarily made without warrant, and thus to give to an utterly lawless act the appearance of legal innocence.

The district court saw nothing unconstitutional in the foregoing method of waging war on crime. He applied the familiar rule that no warrant is required to arrest on view and that search and seizure in such circumstances are not unreasonable. This rule is merely an exception to the broad rule that search and seizure without warrant are unlawful, but the effect of the district court decision is to make the exception the broad rule and to nullify much of the protection intended by the Fourth Amendment. Justification for the ruling must be found in what the court said: "The government agents herein were not pressed for time but we do not think that their failure to procure a search warrant during this period requires suppression of the evidence they found. They were drawn to the scene of the alleged crime by one of their own number allegedly working with the suspects. This was good police work and efficient crime detection" (R. 127). There was "no fracture of the defendants' constitutional privileges" (R. 127), and under the circumstances the search was not unreasonable, the court ruled. 70 Fed. Supp. 764, 765, 766.

Specification of Errors to Be Urged

The circuit court of appeals erred:

1. In holding that revenue officers have power, despite the mandate of the Fourth Amendment, to act without warrant under a situation in which the Government possessed

full prior knowledge of the *corpus delicti*, opportunity to obtain the warrant and ample time within which to seek it.

2. In holding that an arrest and search, made on view without warrant and without any necessity, real or apparent, for such summary action is not in violation of the Constitution, Fourth and Fifth Amendments.

3. In holding that the constitutional rights of the petitioners were not, in this case, infringed upon by action without warrant.

4. In affirming, instead of reversing the judgment of the district court dismissing the petition for return of property and suppression of evidence.

Reasons for Granting the Writ

As Interpreted by this Court only unreasonable searches and seizures are forbidden by the Fourth Amendment, with each case to be decided on its own facts and circumstances. *Harris* v. *United States*, 331 U. S. 145, citing *Go-Bart Importing Company* v. *United States*, 282 U. S. 344, 357. The holding below that search and seizure on view and without warrant are not unreasonable, no matter how great the nonfeasance of the officers in refusing to apply for a warrant, unconstitutionally dilutes the special protection intended by the Fourth Amendment and is clearly wrong. A *bona fide* arrest, on view or on warrant, followed by an incidental search as in the *Harris* case is said to justify search and seizure as "reasonable," but in the present case there was no *bona fide* need for proceeding without warrant, thus rendering what was done here "unreasonable."

While officers acting in good faith may proceed without warrant because of emergent need and thus "reasonable," it is otherwise if through their own deliberate nonfeasance they refuse to seek a warrant, for they can hardly derive

an advantage from their own wrong. There was no need in this case, real or apparent, for action without warrant. Nilson, the undercover investigator, could easily have made the required affidavit even to the extent of supporting a night raid, because he could have sworn positively that the contraband property was in the place to be searched. 18 U. S. C. A., Sec. 620. The search warrant would have been good for ten days. 18 U. S. C. A., Sec. 621. Congress never intended to give to the Treasury officers the power they used here, for they are limited to obtaining warrants. 26 U. S. C. A., Sec. 3602, 3117, Internal Revenue Code.

The ruling below actually puts a premium on evasion of the Fourth Amendment, for when no warrant is sought it cannot be held defective. Thus the executive department is encouraged to proceed without warrant, although the intent of the amendment is otherwise. So reluctant is Congress to grant plenary powers to enforcement officers that even the F. B. I. cannot arrest without warrant "except where there is a likelihood of the person escaping before a warrant can be obtained for his arrest." 5 U. S. C. A., Sec. 300a. This restriction is indicative of a congressional intent to compel officers to obtain the license of the judicial department unless time will not permit.

Persons suspected of defrauding the revenues by manufacture of alcohol do not, because of such suspicion, lose the protection of the amendment. They have every right to complain of infringement, not only because the constitution affords refuge in such complaint but because it is beneath the dignity of a free people to tolerate law enforcement grounded in violation of the basic law. That a generous policy permits complaint on the part of unsavory persons for violation of their constitutional rights is because a great people insist that it be that way. There are rules of war applicable to the fight upon crime, the first of which is that officers must keep within constitutional bounds, and

when these rules are violated the officers will lose the fruits of their zeal.

If existence of the Fourth Amendment should hamper law enforcement to undue extent the remedy is to repeal the amendment and not to nullify it by judicial construction, but in truth much of the complaint against the amendment by officers is unfounded. Laws can be and are enforced daily without either third degree or other unconstitutional acts, for there are few crimes that competent officers, willing to apply ability and energy to the task, cannot ferret out in a lawful fashion. Those few unfound offenses may go unprosecuted without the country going to ruin, for in the words of Mr. Justice Holmes, "we must consider the two objects of desire both of which we cannot have, and make up our minds which to choose." *Olmstead* v. *United States,* 277 U. S. 438, 470. In the present case the warrant was readily obtainable and proper law enforcement was entirely unhampered by the amendment.

Hitherto search could not be made without warrant when opportunity to obtain the warrant existed. *Carroll* v. *United States,* 267 U. S. 132, 156; *Taylor* v. *United States,* 286 U. S. 1, 6. Last term, in *Harris* v. *United States,* 331 U. S. 145, by divided vote this Court decided that a *bona fide* incidental search after lawful arrest under warrant is not unreasonable, but in the present case there was no warrant of any kind, ample prior knowledge, time and opportunity existed to obtain the warrant and the officers acted deliberately without judicial sanction, not claiming necessity for such summary action.

The *Taylor* and *Carroll* cases in this Court, and in the second circuit the cases of *In re Milburne,* 77 F. (2d) 310, 311, and *United States* v. *Edelson,* 83 F. (2d) 404, state that where government agents have ample opportunity to procure a warrant they must do so. In the third circuit, after affirmance of the present case, a contrary rule prevails.

Manifestly, therefore, the decision below presents a question of fundamental importance in constitutional law and Federal criminal practice, which must be decided by the authoritative decision of this Court.

The petitioners therefore respectfully submit that their petition for a writ of certiorari should be granted.

FRANK G. SCHLOSSER,
Attorney for Petitioners.

November 5, 1947.

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FILED
FEB 11 1948
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM—1947

No. 427

JACK TRUPIANO, ROMILDO RICCARDELLI, ANTHONY ANTONIOLE and RIORDAN J. A. ROETT, JR.,

Petitioners,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE PETITIONERS

FRANK G. SCHLOSSER,
Counsel for Petitioners.

On the Brief:
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IN THE

Supreme Court of the United States

OCTOBER TERM—1947

No. 427

JACK TRUPIANO, ROMILDO RICCARDELLI, ANTHONY ANTONIOLE and RIORDAN J. A. ROETT, JR.,

Petitioners,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE PETITIONERS

Opinions Below

The Circuit Court of Appeals affirmed without opinion (R. 111), the affirmance being reported in 163 F. 2d 828. The opinion of the District Court (R. 103-106) is reported in 70 Fed. Supp. 764.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered October 7, 1947 (R. 112). The petition for certiorari was filed November 5, 1947, and the writ was granted December 15, 1947. 333 U. S. . The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 USCA, Sec. 347).

Appealability of Judgment

Appeal will lie in proceedings before indictment to suppress evidence illegally seized. Such proceedings are independent actions undertaken before institution of the criminal case as such. *Go-Bart Importing Company* v. *United States*, 282 U. S. 344, 356; *Burdeau* v. *McDowell*, 256 U. S. 465; *Perlman* v. *United States*, 247 U. S. 7, 13. The appealability of the order was conceded by the Government in the Circuit Court of Appeals. On the application for certiorari the Government expressly called attention to the concession in the Court below and stated that they "do not press the point here" (Brief in Opp., p. 3, footnote 2).

Questions Presented

Whether revenue officers have power, despite the mandate of the Fourth Amendment, to act without search warrant under a situation in which the Government possessed full prior knowledge of the *corpus delicti*, opportunity to obtain the warrant and ample time within which to seek it.

Whether search and seizure in such circumstances are unconstitutional.

Constitutional Provisions, Rules of Criminal Procedure, and Statutes Involved

The Constitution:

The Fourth Amendment to the Constitution provides—

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment, insofar as pertinent, provides—

> No person * * * shall be compelled in any Criminal Case to be a witness against himself, * * *.

Arrest:

Rule 4 of Federal Rules of Criminal Procedure (1946), so far as pertinent here, provides that:

> Rule 4. Warrant or Summons upon Complaint.
>
> (a) Issuance. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. * * *

18 U. S. C. A., Sec. 53a (49 Stat. 877) provides in part:

> Any officer, agent or employee of the United States engaged in the enforcement of any law of the United States who * * * shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor * * *: Provided that nothing herein contained shall apply to any officer, agent, or employee of the United States serving a warrant of arrest, or arresting or attempting to arrest any person committing or attempting to commit an offense in the presence of such officer, agent or employee, or who has committed, or who is suspected on reasonable grounds of having committed, a felony.

Search and Seizure:

Rule 41 of Federal Rules of Criminal Procedure (1946), so far as pertinent here, provides that:

Rule 41. Search and Seizure.

(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property

(1) * * *

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) * * *

(c) Issuance and Contents. * * *

(d) Execution and Return with Inventory. The warrant may be executed and returned only within 10 days after its date. * * * The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. * * *

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court * * * for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant * * *.

In notes to Rule 41 the Advisory Committee have stated that the rule is a codification of existing law and practice, and that: Subdivision (a) is a restatement of existing law, 18 U. S. C. A., Sec. 611; Subdivision (b) is a restatement of existing law, 18 U. S. C. A., Sec. 612, but that the provision does not supersede or repeal special statutory provisions permitting the issuance of search war-

rants in specific circumstances; Subdivision (d) is a restatement of existing law, 18 U. S. C. A., Secs. 621-624; Subdivision (e) is a restatement of existing law and practice, 18 U. S. C. A., Secs. 625, 626, except that the motion must now be heard by the Court and not by the Commissioner.

In note to Subdivision (g) of Rule 41 the Committee cite special statutory provisions, still preserved, permitting searches and seizures in specific situations, among which are the following statutes pertinent to this case:

26 U. S. C. A., Internal Revenue Code, Sec. 3117:

> (a) Duties. * * * the Commissioner, his assistants, agents, and inspectors, may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, * * *. Officers mentioned in said section 1014 are authorized to issue search warrants under the limitations provided in title XI of the Act of June 15, 1917, 40 Stat. 228 (U. S. C., Title 18, Sections 611-633).

26 U. S. C. A., Internal Revenue Code, Sec. 3602:

The several Judges of the District Courts of the United States, and the United States Commissioners, may, within their respective jurisdictions, issue a search warrant, authorizing any Internal Revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the Revenue has been or is being committed upon or by use of the said premises.

26 U. S. C. A., Internal Revenue Code, Sec. 3116:

> It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall

> exist in any such liquor or property. A search warrant may issue as provided in title XI of the Act of June 15, 1917, 40 Stat. 228 (U. S. C., Title 18, Sections 611-633) for the seizure of such liquor or property. * * *

Statutes violated by operation of illicit still:

In general, operation of an illicit still entails violation of the statutes following: 27 U. S. C. A., Sec. 203, engaging in the business of distilling distilled spirits without basic permit, a misdemeanor under Sec. 207 punishable by not more than $1,000 fine; Internal Revenue Code, Sec. 3173(b), evading taxes imposed under Sec. 2800(a), a misdemeanor punishable by fine or by imprisonment for not more than one year, or both; Internal Revenue Code, Sec. 2803(a), possession of distilled spirits without tax stamps affixed to the container, punishable under subsection (g) by fine or by imprisonment not exceeding 5 years, or both; Internal Revenue Code, Sec. 2810(a), possession, custody or control of an unregistered still, punishable by fine and by imprisonment for not less than one month nor more than 2 years; Internal Revenue Code, Sec. 2812(a), engaging in business of distiller without giving the statutory notice to Collector of the District, punishable by fine; Internal Revenue Code, Sec. 2814(a), failure or refusal to give notice and distiller's bond, punishable by fine and by imprisonment for not less than six months nor more than 2 years; and Internal Revenue Code, Sec. 2833(a), engaging in or carrying on the business of a distiller without giving bond or with intent to defraud the United States of the tax on spirits distilled, punishable by fine and by imprisonment for not less than 30 days nor more than 2 years.

The seven offenses set forth in the preceding paragraph were those charged against petitioners in the formal complaint on which they were arraigned before the Commissioner (R. 6-7). There was no charge of a conspiracy under

18 U. S. C. A., Sec. 88, an offense punishable by fine or by imprisonment for not more than 2 years, or both, and there was no charge of violating the statute on industrial alcohol, Internal Revenue Code, Sec. 3115, an offense punishable by a penalty of not exceeding $1,000 or by imprisonment not exceeding 30 days, or both, for a first offense.

The seven offenses charged by formal complaint against the petitioners comprise statutory felonies and misdemeanors: those carrying punishment by imprisonment for a term exceeding one year are felonies, and those providing lesser penalties are misdemeanors. 18 U. S. C. A., Sec. 541.

New Jersey Constitution:

At time of arrest the 1844 Constitution of New Jersey was in effect. Under the Bill of Rights in that constitution it was provided that:

> Art. 1, Para. 6. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized. (N. J. S. A., Constitution, p. 162.)

The 1947 Constitution of New Jersey, effective January 1, 1948, re-enacted the same provision in Art. 1, Para. 7, unchanged with a single minor exception: the word "but" was altered to "except."

New Jersey Alcoholic Beverage Control Law:

R. S. 33:2-3. Seizure of unregistered stills; search warrant; arrest of offenders:

> Any officer knowing or having reasonable cause to believe that any still or distilling apparatus or any parts thereof constitute such unlawful property,

it shall be his duty to investigate, under proper search warrant when necessary, which it shall be his further duty to apply for, and to seize such still or distilling apparatus or parts thereof, together with all articles, implements or paraphernalia used or adaptable for use in connection therewith and all personal property of whatsoever kind, found in a building or in any yard or inclosure connected with a building or on the premises in which such still or distilling apparatus or parts thereof are found, and to arrest all persons whom he shall know, or have reasonable ground to believe, are committing, or have committed, a misdemeanor under this chapter, and to make complaint against such persons as in other cases of misdemeanors. * * * [N. J. S. A. (1937)—P. L. 1934, c. 84, s. 3, p. 216, as am. by P. L. 1935, c. 255, s. 3, p. 782.]

33: 1-65: Search without warrant; misdemeanor.

Any person who shall intentionally search any private dwelling occupied exclusively for dwelling purposes, without a warrant therefor, or who shall maliciously and without probable cause, and without a warrant therefor, search any other building, premises, vehicle or place, shall be guilty of a misdemeanor [N. J. S. A. (1937); P. L. 1933, c. 436, s. 63, p. 1217.]

Statement

After arrest, but before indictment, petitioners applied to the District Court under Rule 41(e) of the Rules of Criminal Procedure (1946) for return of property taken and suppression of evidence on the ground that the same had been seized unlawfully without warrant (R. 2-4). This is the practice sanctioned by precedent and the new rules. *In re Fried*, C. C. A. 2, 161 F. 2d 453, 458, note 1 collecting the cases. In proceedings involving property in part contraband, which cannot be returned, the purpose and effect of the motion is to secure return of non-contraband and restraint against use as evidence of the contraband seized.

The motion was for return of "all papers, records and documents and other property seized * * * and all still equipment, mash, alcohol, and other property seized" and for restraint against "the United States Attorney * * * and the Agents of the Alcohol Tax Unit * * *" from using the aforesaid property, matters and things in any trial or hearing; and any information directly or indirectly obtained therefrom and by means thereof," and for "such other and further relief as may be just and proper" (R. 2).

Under Rule 41(e) it is provided that the motion to suppress "shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds of the motion, but the court in its discretion may entertain the motion at the trial or hearing." It is plain from the precedents and the rule that such a motion is a favored one in aid of the rights granted under the Fourth Amendment and, like the Amendment, is to be liberally construed lest those rights be impaired.

At the hearing on the motion, petitioners offered in evidence the record of the preliminary examination before the United States Commissioner taken at Asbury Park, in the county in which search and seizure had been effected (R. 4-93); the Government submitted affidavits of the 3 agents who had taken part in the seizure (R. 93-103), together with affidavit of Nilson, secret agent of the Alcohol Tax Unit of the Treasury Department.

The District Court held that the search and seizure met the constitutional test of reasonableness and denied the motion to suppress (R. 103-106). Upon appeal the Circuit Court of Appeals affirmed (R. 111-112) without opinion. Meanwhile petitioners have been indicted and the prosecution is pending.

This Court allowed certiorari to four petitioners. After allowance of the writ, and before argument, petitioner Anthony Antoniole died.

In the Courts below and here on the application for certiorari the Government did not claim that circumstances prevented the obtaining of a warrant, but offered as sole justification the statement that a crime was being committed in the presence of the revenue officers for which reason search and seizure were said to be proper as incident to a lawful arrest on view. On their part the petitioners showed, entirely without any attempt at contradiction by the Government, that the Treasury Department officials and agents possessed full prior knowledge of the continuing *corpus delicti* incident to operation of an illicit still, had opportunity to obtain warrant from the judiciary and ample time within which to seek it, but deliberately had refrained from obtaining a warrant; the petitioners maintained below and maintain here that for such nonfeasance the acts of the revenue officers were unreasonable and in violation of the Fourth and Fifth Amendments.

The evidence before the District Court came entirely from the government officers and from Kell, the informer. It was not in conflict and showed the following facts:

In January, 1946, petitioners sought to lease part of the Kell farm located in Allenwood, Wall Township, Monmouth County, New Jersey. Kell, suspicious of their motives, reported the matter to the Government and was permitted to accept the offer provided he would cooperate with the Treasury Department and keep the Government informed of all developments (R. 65-68; 71-73; 78-82). Mr. Gettel, Investigator-in-charge of the Alcohol Tax Unit of the Treasury Department, admitted under oath that: "I told him that if he did so and wanted to work with the Government that the Government would be with him" (R. 66). In mid-February the Government arranged with Kell to receive Alcohol Tax Unit Investigator Nilson on the farm in the disguise of a farm hand, whereupon Nilson appeared on the premises and performed farming operations for Kell until June 3, the date of the raid (R. 37;

83-86; 97). Toward the end of March Kell leased (R. 77; 86) part of his farm to petitioners for $300. a month and introduced Nilson to them as a relation of Mrs. Kell. Under instruction of his superiors Nilson then became an employee of petitioners and, with Kell, assisted in erecting a house and still, accepting money for his labor and turning it over to the Government, at the same time keeping his superiors constantly informed concerning progress in erecting the still.

The still commenced to operate on May 13 and Nilson thereafter worked as "mash man" for $100. a week, assisting daily in operation of the plant and making prompt and frequent reports to his superiors in the Treasury Department (R. 43-47; 49-60; 95-96; 97-98). The Government permitted the still to be operated for three weeks, from May 13 to June 3, on which latter date the premises were raided. During this period Nilson assisted daily in the production of alcohol (R. 58-60). On May 20, Nilson personally conferred with his superiors and gave Investigator-in-charge Gettel samples of each run of alcohol, several sugar bags, a yeast wrapper and an empty five-gallon can which he had taken by stealth from the still premises (R. 96), the conference taking place at Laurelton, New Jersey, at the home of Nilson's father (R. 98). It was Nilson's habit to confer with his superiors at various places a number of miles from the Kell farm, in the course of which he met high officials, *i. e.*, the District Supervisor and the Assistant Supervisor in Charge of Enforcement, top officials of the Unit in the district (R. 95-96), and at these meetings the conversation "would be about the still building I had assisted in erecting or about the illicit distillery that I was working at on the Kell farm" (R. 96).

On May 20 the still had been in full operation for one week and, through Nilson, the Government was in complete possession of every detail of the case, including identity of the principals (R. 46). Thus on May 20 and thereafter,

if not before, the Government had ample evidence on which to apply for a warrant. It has never claimed otherwise. No warrant was sought (R. 12; 63).

On May 26 a two-way portable radio set was dispatched to Nilson by his superiors and was delivered by Investigator Casey. Nilson used the apparatus to transmit frequent bulletins to the Alcohol Tax Unit (R. 98). Again no warrant was applied for, although the evidence in possession of the Government was more than ample to permit seeking one. On May 31, on radio intelligence supplied by Nilson, a motor vehicle loaded with 94 five-gallon cans of alcohol was seized by the Unit at Newark, New Jersey, about an hour after it had left the farm; the driver was arrested (R. 94; 96; 99).

The seizure of truck and alcohol took place some 76 hours before the raid, yet in all the intervening time the Government made no effort to obtain a warrant. The Alcohol Tax Unit operates out of Newark, in which city District Court judges sit daily and a United States Commissioner is always available; another is available at Asbury Park, Monmouth County, less than a half hour drive from the Kell farm. Future events disclosed that the revenue officers never intended to obey the mandate of the Fourth Amendment and that they purposed to act without putting the matter before the judicial department. There could have been no difficuly in obtaining the warrant, the evidence being in possession of the Government, but again the Government deliberately avoided seeking one.

On June 3 Nilson radioed that two of the principals were at the still and that a load of sugar was due to arrive (R. 96; 99). Nilson knew then that the raid would be made that night, for he told Kell that "tonight is the night" (R. 91). The raid took place shortly before midnight, entirely without warrant, although one could easily have been obtained. Indeed, the drama of the midnight descent

of the revenue men on the still would have been perfectly possible and lawful under a nighttime warrant, for the Government had positive evidence that still, mash and equipment were in the place to be searched. Rule 41(c) Federal Rules of Criminal Procedure (1946); 18 U. S. C. A., Sec. 620.

The actual raid was carefully planned by the Tax Unit and was well executed by very skillful officers who, tongue-in-cheek, claimed that the odor of mash and noise of machinery led them to suspect operation of a still and that, through an open door of the still house, the still was seen, fires banked, while Antoniole was in the building (R. 10-11). Arrest of Antoniole then was made, the search was undertaken and turned up still, mash, machinery, alcohol, cans and equipment.

Initially the raid did not net the other petitioners. They were apprehended later the same night. The record shows that Trupiano and Riccardelli were arrested by Investigators Dell and Fox and brought to the premises after the seizure (R. 9). The record is silent as to circumstances of their arrest. (Trupiano and Riccardelli state that they had gone to bed in their dwelling at Spring Lake, 6 or 7 miles from the still house, at about 11:30 P. M. Between 1:30 and 1:45 A. M. Fox and Dell, forcing way past the landlady, entered the room where the 2 petitioners were sleeping, pulled them out of bed, searched the room, searched them, compelled them to dress, arrested and brought them to the still, not telling them why they had been arrested. *Cf.* The Waste Dealer's Case, *Christie* v. *Leachinsky*, 1 All Eng. L. Rep. 567, at p. 572-573, 575-576, 578-580, on unlawfulness of arrest made without announced reason.) Roett was placed under arrest as he approached the scene after Antoniole's arrest and after the seizure had been made (R. 95; 101). The raid took place between 11:30 and 11:45 P. M. (R. 12) and the seizure was made immediately after arrest of Antoniole (R. 103). The revenue officers had

neither warrant to arrest nor one to search (R. 12); this fact was conceded by the Government on the application for certiorari.

An automobile truck standing in front of the still house was also searched "thoroughly for papers and things of an evidenciary nature" (R. 100). The Government admitted that the petitioners were also searched (R. 9) but did not disclose the objects taken. (Roett states that he was searched by Investigators Casey and Van de Car and that they took from him: his wallet, some $300. in cash from his pocket, personal papers, and records of expenses, all of which the Government still retains except the cash which has been returned; he also states that Van de Car searched Antoniole and took some $10. or thereabouts in cash, some personal effects, and a notebook said to contain record of receipts and events.) The raid was made by Gettel, Van de Car and Casey and prior thereto the agents did not see Trupiano, Riccardelli or Roett on the scene (R. 25).

The raid was planned to appear as one necessarily made without warrant to arrest or search, but the facts show that the elaborate actions of the raiding party were mere deception amounting to nothing more than self-serving declarations designed to simulate an emergent arrest necessarily made without warrant and to give to an utterly lawless act the appearance of legal innocence.

Thus during the preliminary examination before the commissioner, Investigator Van de Car testified on direct that a strong odor of fermenting mash, the sound of a motor in operation and the sight of the still led him to act (R. 7-8). Cross examination failing to bring out the entire story the agent was called as a defense witness and this resulted in eliciting the fact that Van de Car knew about the still on the Kell farm "a couple of weeks previous to the raid" (R. 26) and that Investigator-in-charge Gettel

know it also (R. 27). The same procedure had to be gone through with Nilson: on direct he confined his testimony to the night of the raid and it required cross examination to unearth the Government secret (R. 42-49) in part, and calling him as a defense witness to bring out the whole tale (R. 49-60). Nothing pertinent was obtained from Mr. Gettel on direct or cross (R. 61-62) and he, too, had to be called as a defense witness. This brought out the details of the secret (R. 62-70). The Government did not call the informer, Kell, but the petitioners did and this resulted in more light thrown on the intimate details of the Government's actions (R. 70-93).

The Government agents were less than frank concerning the true facts surrounding the raid, and these facts had to be extracted from them on the witness stand item by item. Eight months later they made affidavits for the record and, making virtue of necessity, admitted that they had known all about the still long in advance of the raid. Thus Van de Car admitted in his affidavit that he had visited Nilson two nights before the raid and had spoken with him about the still and the seizure, the day before the conversation, of the truck and alcohol at Newark (R. 102); Casey admitted that he had been working on the case for months, that he was the Unit's contact man with Nilson, that he had visited the Kell farm and had also met Nilson 3 or 4 times a week for a number of months at which times the two men "discussed the operations that were going on at said farm and the work he (Nilson) was doing," and that he had relayed the radioed information from Nilson which had resulted in seizure of truck, alcohol and driver at Newark on May 31 (R. 93-94). Gettel, the Investigator-in-charge, gave all the details in his affidavit and volunteered the information that he had searched "thoroughly for papers and things of an evidentiary nature" the automobile truck standing in front of the still house (R. 97-101). In this fashion the Government be-

latedly admitted facts showing that it had staged an allegedly emergent raid, arrest, search and seizure, but that the "emergency" had been mere protective coloration designed to conceal *scienter* and thereby to justify failure to obtain the warrant of the judicial department for the acts of the revenue agents.

The District Court saw nothing unconstitutional in the foregoing method of waging war on crime. He applied the familiar rule that no warrant is required to arrest on view and that search and seizure in such circumstances are not unreasonable. This rule is merely an exception to the broad rule that search and seizure without warrant are unlawful, but the effect of the decision is to make the exception the broad rule and to nullify much of the protection intended by the Fourth Amendment. Justification for the ruling must be found in what the Court said: "The government agents herein were not pressed for time but we do not think that their failure to procure a search warrant during this period requires suppression of the evidence they found. They were drawn to the scene of the alleged crime by one of their own number allegedly working with the suspects. This was good police work and efficient crime detection" and there was "no fracture of the defendant's constitutional privileges" (R. 106).

Specifications of Errors to be Urged

The Circuit Court of Appeals erred:

1. In holding that revenue officers have power, despite the mandate of the Fourth Amendment, to act without warrant under a situation in which the Government possessed full prior knowledge of the *corpus delicti*, opportunity to obtain the warrant and ample time within which to seek it.

2. In holding that an arrest and search, made on view without warrant and without any necessity, real or ap-

parent, for such summary action is not in violation of the Constitution, Fourth and Fifth Amendments.

3. In holding that the constitutional rights of the petitioners were not, in this case, infringed upon by action without warrant.

4. In affirming instead of reversing the judgment of the District Court dismissing the petition for return of property and suppression of evidence.

Summary of Argument

The facts and circumstances of this case sum up to an unreasonable search and seizure violative of the Fourth Amendment. This is so both as to the contraband seized the night of the raid and as to evidence secretly abstracted by the undercover agent and turned over to the Government before the raid.

I

When seizure is made in violation of the Amendment the fruits of the unlawful search will not sustain a conviction. Evidence so obtained must be returned or suppressed. Search is not made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success. The Court will protect the citizen's rights under the Fourth Amendment as of the very essence of constitutional liberty. The Amendment is to be construed liberally, to the end that every man shall receive every right afforded to him. It is beneath the dignity of a free people to tolerate law enforcement grounded in violation of the basic law. Officers who violate the Amendment will lose fruits of their zeal. It is only unreasonable searches and seizures which violate the Amendment, but

on the facts and circumstances of this case the unreasonableness of the seizures clearly appears.

II

A. Evidence seized on night of raid.

The Government possessed ample prior knowledge, time and opportunity to obtain warrants and, under the facts and circumstances of this case, its refusal to proceed by warrant and its actions without warrant were unreasonable. The arrests and seizures were not justified under federal law and were not justifiable under the laws of the State of New Jersey. *Taylor* v. *United States* is controlling or points the way toward decision for petitioners. Conflict on the point between 2nd and 3rd circuit decisions must be resolved by this Court. The evidence amounts to fruit of an unlawful search and seizure and must be suppressed. The Amendment did not hamper proper law enforcement in this case and even if it did the policy fixed by the forefathers against a too permeating police surveillance would have to prevail.

B. Evidence secretly abstracted and turned over to the Government.

The evidence secretly abstracted by the undercover agent, Nilson, is the fruit of an unlawful seizure and must be suppressed. *Gouled* v. *United States* is controlling.

Argument

The facts of this case are simple. The Government placed an undercover agent on a farm in disguise of a farm hand. It then permitted the farmer to lease part of his farm for erection and operation of an illicit still, on his promise to cooperate with the Government, giving express

assurance that if the farmer worked with the Government it "would be with him." With the active help of the farmer and the secret agent a still house was built and the still and equipment installed. The secret agent then worked for the distillers as "mashman" for pay and assisted in production of alcohol, at the same time making his reports to the Government. He secretly abstracted evidence and turned it over to his superiors. The Government permitted the still to operate for 3 weeks and then raided it without warrant. Although the Government had ample knowledge, time and opportunity to obtain a warrant it declined so to do. Entirely without warrant it arrested one of the petitioners, then seized still and equipment, and thereafter arrested the remaining 3 petitioners.

We believe that the evidence secretly taken by the undercover agent and turned over to the Government was seized in violation of the Fourth and Fifth Amendments, and that refusal of the Government to obtain warrant of the judicial department before springing the trap on petitioners was unreasonable and in violation of the same amendments and the decisions of this Court.

I

Unlawful search and seizure in violation of the Constitution, Fourth and Fifth Amendments.

When a seizure is made in violation of the Fourth Amendment, a conviction based upon evidence so obtained cannot be sustained. *Boyd* v. *United States*, 116 U. S. 616; *Weeks* v. *United States*, 232 U. S. 383; *Agnello* v. *United States*, 269 U. S. 20; *Harris* v. *United States*, 331 U. S. 145, 150; *United States* v. *Di Re*, 333 U. S. ——.

Evidence obtained in violation of the amendment must be returned. *Weeks* v. *United States, supra* at page 398. Such evidence must be suppressed and the Government

enjoined from using it. *Go-Bart Co.* v. *United States*, 282 U. S. 344, 358; *United States* v. *Lefkowitz*, 285 U. S. 452; Rule 41(e), Rules of Crim. Proc. (1946).

A search is not made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success. *United States* v. *Di Re*, 333 U. S. ——; *Byars* v. *United States*, 273 U. S. 28. Most unlawful searches result in seizure of contraband or incriminating evidence of some type; if result could justify means employed the amendment would be reduced to a form of words.

The analysis accompanying dissenting opinion in the *Harris* case, 331 U. S. at pages 175-181, makes available for ready reference the decisions of this Court on search and seizure from the *Weeks* case down to last year. In addition the important decisions of the Court down to 1921 and 1922 are analyzed in two available articles: Fraenkel, "*Concerning Searches and Seizures*," 34 Harvard L. Rev. 361-387; Chafee, "*The Progress of the Law*, 1919-1922," 35 Harvard L. Rev. 694-704. Others have added to the literature on the subject, but the best source being in the decisions of the Court it is upon the decisions that we rely.

For the Court it was said in the *Harris* case that it "has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment '* * * are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guarantees of the other fundamental rights of the individual citizen * * *'. Gouled v. United States, 1921, 255 U. S. 298, 304." *Harris* v. *United States*, 331 U. S. 145, 150. In January of the present year, in sustaining reversal of the *Di Re* conviction, the Court demonstrated that every attempt to deprive the citizen of his rights under the Fourth and Fifth Amendment would be struck down.

The Court never forgets that it is interpreting a Constitution. No narrow rules of construction are indulged in. "The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be an impairment of the rights for the protection of which it was adopted." *Go-Bart Co.* v. *United States*, 282 U. S. 344, 357.; *cf. United States* v. *Lefkowitz*, 285 U. S. 452, 464; *Grau* v. *United States*, 287 U. S. 124, 128; *Sgro* v. *United States*, 287 U. S. 206, 210.

That appeal to this Court is oftener made by a violator than by the law-abiding does not and must not influence the result. The Court must and does insist that every man shall receive every right afforded to him by the Amendment; when it perceives that an unconstitutional seizure has been made in violation of those rights it must and will give relief to all.

Persons suspected of defrauding the revenues by manufacture of alcohol without payment of tax do not, because of that suspicion, lose the protection of the Amendment. They have every right to complain of infringement, not only because the Constitution affords refuge in such complaint but because it is beneath the dignity of a free people to tolerate law enforcement grounded in violation of the basic law. That a generous policy permits complaint on the part of unsavory persons for violation of constitutional rights is because a great people insist that it be that way. There are rules of war applicable to the fight upon crime, the first of which is that officers must keep within constitutional bounds; when these rules are violated the officers will lose the fruits of their zeal.

The amendment denounces "unreasonable searches and seizures" and it is held that "it is only unreasonable searches and seizures which come within the constitutional interdict. The test of reasonableness cannot be stated in rigid and absolute terms. 'Each case is to be decided on its

own facts and circumstances.' Go-Bart Importing Company v. United States, 1931, 282 U. S. 344, 357." *Harris* v. *United States*, 331 U. S. 145, 150.

We now proceed to demonstrate the unreasonableness of the seizures on the facts and circumstances of our case.

II

Under facts and circumstances of the case, the seizures were unreasonable and unconstitutional.

No warrant was employed by the Government, either as a *capias* or to search, and the seizures were of 2 types: (1) still, mash, papers, &c., seized openly on night of the raid; (2) evidence stealthily abstracted by a secret agent of the Government. Rules differ as to each type of seizure and, for such reason, argument is separately addressed to each.

A. Evidence seized on night of raid.

On June 3, shortly before midnight, the still was raided by 3 revenue agents, entirely without warrant and pursuant to plan. Antoniole was arrested in the still house, whereupon still, mash and equipment were seized. Later that same night the remaining 3 petitioners were placed under arrest, brought to the still house, searched, and arraigned the next morning, these arrests taking place after the seizure.

The Government seeks to justify seizures as incidental to lawful arrest. *Harris* v. *United States*, 331 U. S. 145, 151. Petitioners assert that under facts and circumstances of this case arrest and seizure without warrant were unreasonable and violative of Fourth and Fifth Amendments.

The argument for the Government ignores the effect of the all-important secret activities of the revenue officers and long prior knowledge of the continuing *corpus delicti*,

which activities and knowledge permitted, and demanded, recourse to the orderly processes provided by law for arrest and search, *i. e.*, warrant to arrest under Rule 4 and to search under Rule 41.

It would have been very easy for the Government to have obtained warrants to arrest under Rule 4 and to search under Rule 41. Ample knowledge, time and opportunity existed therefor. The still commenced to operate on May 13 and the raid occurred 3 weeks later. Any agent of the Unit might have applied for the warrants and either Nilson, the secret agent, or farmer Kell, the collaborator, could have made the affidavit establishing grounds for issuance. Neither was restrained of liberty, each came and went at will, and a United States Commissioner was located in Asbury Park, only a short drive from the scene. Even a nighttime raid would have been possible under warrant, for either Nilson or Kell could have made positive affidavit that the contraband property was in the place to be searched. Rule 41(c). Thus it is seen that existence of the Fourth Amendment did not, in any way, hamper enforcement action if undertaken in the usual orderly manner.

Constitutional rights "against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way." *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392.

Long ago, in the *Carroll* case it was said for the Court by TAFT, *C. J.*, that: "In cases where the securing of a warrant is reasonably practical, it must be used * * *." *Carroll* v. *United States*, 267 U. S. 132, 156. The quoted dictum became law in the *Taylor* case, wherein for this Court it was held: "Although over a considerable period numerous complaints concerning the use of these premises had been received, the agents had made no effort to obtain a warrant for making a search. They had abundant opportunity so to do and to proceed in an orderly way even

after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure the warrant. Moreover, a short period of watching would have prevented any such possibility. We think, in any view, the action of the agents (in searching an unoccupied garage) was inexcusable and the seizure was unreasonable. The evidence was obtained unlawfully and should have been suppressed. See Carroll v. United States, 267 U. S. 132; United States v. Lefkowitz, 285 U. S. 452, and cases there cited." *Taylor* v. *United States*, 286 U. S. 1, 6.

The rule in the *Taylor* case is applied in the 2nd circuit with vigor. Where it is reasonably practical to obtain warrants they must be used. In the *Kaplan* case, in reversing a conviction based upon an arrest and seizure of a still after agents had smelled fermenting mash, and speaking for the Circuit Court of Appeals, Judge LEARNED HAND said: "We are told that unless such evidence will serve, it will be impossible to suppress an evil of large proportions in the residential part of Brooklyn. Perhaps so; any community must choose between impairment of its power to punish crime and such evils as arise from its uncontrolled prosecution. But the danger is not certain, for the officers could have applied for a warrant which—as was at least intimated in *Taylor* v. *United States*—might then have been valid. It takes time to break up a still and take the parts away; if the attempt were made, it would discover itself immediately. One or more officers could have watched, while the others went to a judge or commissioner, whose action would at least put a different face upon their subsequent proceedings." *United States* v. *Kaplan*, C. C. A. 2, 89 F. 2d 869, 871.

In the same circuit, in the *Edelson* case the same principle was applied. There, without warrant, federal officers called in by baffled state enforcers broke down a partition and discovered a plant for cleaning denatured alcohol.

In reversing the order below, and ordering suppression of evidence, the Court said: "Under the circumstances disclosed, the search was unreasonable and illegal. It was not made pursuant to a search warrant, although there was ample time to secure one if adequate cause existed for issuing it." *United States* v. *Edelson*. C. C. A. 2, 83 F. 2d 404, 405. The same principle was asserted in the *Milburne* case, but did not have to be followed because federal men had not participated in the search. *In re Milburne*, C. C. A. 2, 77 F. 2d 310, 311. In the 3rd Circuit a different rule prevails and this Court must resolve the conflict.

In the present cause the District Court did not follow the principle of the *Taylor* case, asserting a distinction said to arise out of the fact that in the cited case there was no arrest, while here there was one. We deem the distinction more illusory than real: assuming that necessity to arrest on view will make reasonable a seizure without warrant, there was in this case no necessity, real or apparent; therefore the constitutional principle of the *Taylor* case must be followed here, the entire absence of any necessity to act without warrant being fully equivalent to the absence of an arrest in the cited case.

The overriding reason for the *Taylor* decision was lack of excuse for ignoring the usual and orderly mode of procedure by warrant, the lack being pointed up by absence of anyone requiring to be arrested; in the present case similar lack of excuse appears from the facts. In the cited case the act was wrong because unnecessary and it was wrong in this case, too, for the same reason. The true test, it seems to us, is not presence or absence of an arrestee, but of any reasonably apparent need for summary action. That is the teaching of the *Taylor* case and the District Court erred in perceiving a distinction of form only and holding it to be one of substance. Thus the *Taylor* holding either controls the present cause, or points the way toward decision for the petitioners.

We see no substantial difference between what was held to be unlawful in the *Silverthorne* case and what was done in this cause. There a clever method had been devised to circumvent the Amendment under color of law, but this Court scotched the attempt; the Government could not derive an advantage from its own wrong and to permit evasion of the Amendment would be to reduce it to a "form of words." *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392. In the present case an alleged arrest on view was staged, in order to give color to claim that summary action was required, and thereby the protection of the Amendment was sought to be taken away. If this be lawful the protection of Fourth and Fifth Amendments will be reduced to form of words. The advantage to the Government in avoiding use of a warrant is obvious: a search and seizure made without warrant cannot be held defective by reason of inartificial preparation of the supporting affidavits or the warrant itself. If the Government can so proceed, few warrants will ever be sought and thus the protection intended by the Amendment will be seriously diluted.

The *Harris* case, decided last term by divided vote, does not, as we read the majority opinion, do more than say that if the Government proceeds in absolute good faith it may have the benefit of an incidental search. If the investigators had known of the existence of the draft cards secreted in the drawer and had devised an arrest under mail fraud warrant in order to search for the cards, it is not likely that the position of the Government could have found any support in the Court. On the issue of good faith the *Harris* case went the way it did, but in the present case the facts show entire lack of good faith: here the Government knew all along about the still, its agents helped to erect and operate it, and its investigators knew what they were going to find before the raid was made. On such a showing the Government cannot spell out of the *Harris* case any support for its present position.

The Fourth Amendment secures not only houses, papers and effects against unreasonable search and seizure, but also *persons*. Not only were search and seizures unlawful, but also arrest of the persons themselves. The right of the citizen to complain of an unlawful search and seizure of his property without warrant is not all the amendment grants: he has the same right to complain of arrest without warrant when one may easily be obtained. Thus arrest, search and seizures under the circumstances of this case were unreasonable and unconstitutional.

Search and seizure were made on the basis of arrest of Antoniole in the still house. At that time none of the remaining 3 petitioners was seen at the premises by the agents who made the raid. The seizure was over before they were apprehended (R. 25; 94-95). At the time the seizure of the still was made none of the raiding party even saw Trupiano, Riccardelli or Roett. Therefore, as to the 3 petitioners Trupiano, Riccardelli and Roett the search and seizure, completed before their arrest, cannot be said to be incidental to arrest.

In assuming for themselves the right to arrest without warrant under the peculiar facts and circumstances of this case, the Alcohol Tax Unit claim a power that Congress has denied to the Federal Bureau of Investigation, members of which cannot arrest without warrant except "where there is a likelihood of the person escaping before a warrant can be obtained for his arrest." 5 U. S. C. A., Sec. 300a. Such restriction on so important a law enforcing group as the Bureau of Investigation indicates congressional intent to compel officers to obtain license of the judicial department before arresting, unless time will not permit. It is true that marshals and their deputies have been given great powers to arrest without warrant, 28 U. S. C. A., Sec. 504(a), but Congress has not seen fit to clothe revenue agents with the same power.

It is significant that revenue officers, who protect the public purse against acts merely *malum prohibitum* rather than *malum in se*, have been limited to the ordinary and normal processes of the law: they may "swear out warrants" (26 U. S. C. A., Int. Rev. Code, Sec. 3117) and obtain search warrants (26 U. S. C. A., Int. Rev. Code, Secs. 3116, 3602). Congress has given them no specific authority to do otherwise.

There is no general federal rule for arrest without warrant. *United States* v. *Di Re*, 333 U. S. —— (p. 9 of opinion). Nor do we think the existence of exemption from criminal punishment now found in 18 U. S. C. A., Sec. 53(a), and applicable to arrest on view or to felony, actual or suspected, can be construed to provide a general federal rule for arrest without warrant. The cited statute discloses merely a congressional intent to relieve officers from possible criminal prosecution for acts done in heat of the chase, a perfectly proper piece of legislation which Congress could lawfully enact and the President approve; but if the same statute intended to make lawful an unreasonable seizure of the person it would be violative of the Fourth Amendment and unconstitutional.

Ordinarily when officers stumble over crime or encounter a suspected felon they must act swiftly or lose the quarry. For such reason the Fourth Amendment does not forbid summary action. There are cases, however, such as the present one, in which the nonfeasance of the officers is deliberate and carefully calculated to evade the Amendment, ample knowledge, time and opportunity existing for application to be made to the judicial department, and in such cases seizure of person or property without warrant will be unreasonable and unconstitutional. In such a situation exemption from criminal punishment under 18 U. S. C. A., Sec. 53(a) could not constitutionally excuse violation of the citizen's rights under the Fourth Amendment; perhaps the officer could not be punished criminally

for his act, but that act would, nevertheless, result in unconstitutional seizure under the Amendment and the evidence would have to be suppressed.

Testing the actions of the Tax Unit under the laws of New Jersey, *United States* v. *Di Re*, 333 U. S. ——— (p. 8 of opinion), does not result in any improvement in the position of the Government. Assuming, but not conceding, that a state law permits certain acts which, when performed by federal officers, violate the Fourth Amendment, we are still confronted by the fact that those same acts are unconstitutional under the Amendment and the evidence would have to be suppressed; the federal Constitution is the supreme law of the land and the state laws are not. However, we think the New Jersey laws do not permit the acts committed in this case.

In New Jersey constitutional protection against unreasonable seizure of person or property is almost identical in language with the Fourth Amendment (N. J. Const. 1844, Art. 1, para. 6; N. J. Const. 1947, Art. 1, para. 7). Under the Revised Statutes of New Jersey (1937) special statutory provision is made for seizure of illicit stills and arrest of persons concerned with them. The cited statute lays down the procedure to be followed: "* * * it shall be his duty to investigate, under proper search warrant when necessary, which it shall be his further duty to apply for, and to seize such still * * * and all personal property of whatsoever kind, found in a building or in any yard or inclosure connected with a building or on the premises * * *, and to arrest all persons whom he shall know, or have reasonable cause to believe, are committing, or have committed, a misdemeanor under this chapter, and to make complaint against such persons as in other cases of misdemeanors. * * *" *R. S. 33: 2-3.* It is thus seen that, in New Jersey, the laws require use of search warrant in the present case and that such warrant by express enactment of law confers the right of arrest incidental to search. This

is exactly opposite to the federal rule permitting search incidental to arrest, and discloses an intent on the part of the lawmaker to forbid search incidental to arrest and to require that the search be first authorized by the judiciary and arrest be an incident to judicial action permitting the search.

A New Jersey officer will, under the cited statute, need a warrant under the facts and circumstances of this case showing aid in erection of the still and still house rendered by a government agent and a collaborator and ample prior knowledge, time and opportunity to obtain the warrant. Under the State's "Fourth's Amendment" action without search warrant would amount to unreasonable search and seizure and for such reason a proper search warrant would be necessary and it would be the duty of the officer to apply for it, under the statute cited in the preceding paragraph. Otherwise the officer would incur criminal prosecution under the statute absolutely forbidding search of a dwelling without warrant and extending special protection to other property in these words: "* * * or who shall maliciously and without probable cause, and without a warrant therefor, search any other building, premises, vehicle or place, shall be guilty of a misdemeanor." *R. S. 33:1-65.*

Not only were the acts of the revenue officers unlawful under federal law. They were similarly unlawful under New Jersey law. In the *Di Re* case the Government maintained that the actions without warrant were necessitous, but this Court held that necessity could not justify the arrest and search. In the present case, so far at least, the Government has not made an appeal to necessity to justify its actions here.

The actions of the revenue agents on the night of the raid were designed to spring the trap on petitioners and to conduct a general exploratory search to obtain evidence. They had more than enough evidence available through

Nilson, the secret agent, and farmer Kell, the collaborator, to obtain an indictment, a *capias* to arrest, a search warrant, or all three. The character of the search is indicated by admission of the investigator-in-charge that he "then returned to the truck and searched it thoroughly for papers and things of an evidentiary nature" (R. 100). The agent's quoted description accurately sums up the type of search undertaken; the revenue men were not really seeking instrumentalities or fruits of crime, but evidence to convict the petitioners.

To support their acts the revenue officers should have had warrants. "Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime." *United States* v. *Lefkowitz*, 285 U. S. 452, 464.

If existence of the Fourth Amendment should hamper law enforcement unduly, the remedy is to repeal the Amendment and not to nullify it. In truth much of the complaint against the Amendment by officers is unfounded. Laws can be and are enforced daily without third degree or other unconstitutional acts, for there are few crimes that competent officers, willing to apply ability and energy to the task, can not ferret out in lawful fashion. The few unfound offenses may go unprosecuted without the country going to ruin, for in the words of Mr. Justice HOLMES, "we must consider the two objects of desire both of which we cannot have, and make up our minds which to choose." *Olmstead* v. *United States*, 277 U. S. 438, 470. In the words of Judge LEARNED HAND, "any community must choose between impairment of its power to punish crime and such evils as arise from its uncontrolled prosecution." *United States* v. *Kaplan*, C. C. A. 2, 89 F. 2d 869, 871.

In the present case warrants were readily obtainable and proper law enforcement was entirely unhampered by

the Amendment. Even if the Fourth Amendment had hampered the revenue men, although it did not, it is to be remembered that "the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment." *United States* v. *Di Re*, 333 U. S. —— (p. 14 of opinion).

B. Evidence secretly abstracted and turned over to the Government.

The record discloses that on May 20 Nilson, the undercover agent disguised as a farm hand, conferred with his superiors and turned over to them samples of each run of alcohol, several sugar bags, a yeast wrapper and an empty five gallon can which he had secretly abstracted and removed from the premises (R. 96; 98). This seizure was neither under warrant nor in connection with an arrest. It is possible, and quite likely, that he repeated the process on later occasions; if he did so this also was without warrant or in connection with arrest.

The foregoing seizures are clearly unconstitutional and are controlled by the *Gouled* case in this Court. The cited case held that evidence secretly abstracted by an undercover agent of the Government is unlawfully seized, cannot be retained by the prosecution under Fourth and Fifth Amendments, and must be suppressed. *Gouled* v. *United States*, 255 U. S. 298, 306.

The pieces of evidence abstracted by stealth were the fruits of an unlawful search and seizure. They should have been returned on the motion to suppress and refusal of the lower Courts to order such return or suppression of evidence was erroneous.

The matter was ignored by the District Court although the evidence was before him. The opinion is completely

silent on the point but, the motion having included suppression or return of "all papers, records, documents and other property" (R. 2), the Court was legally obligated to grant suppression of the evidence secretly abstracted by the undercover investigator.

CONCLUSION

The actions of the Alcohol Tax Unit and its agents in making the seizures and arrests in this case entirely without warrant were, under the facts and circumstances of the case, unreasonable and in violation of Fourth and Fifth Amendments. The judgments of the Circuit Court of Appeals and the District Court should therefore be reversed, with instructions to suppress the evidence so seized.

Respectfully submitted,

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February, 1948.

On the Brief:
ANTHONY A. CALANDRA.

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No. 427

In the Supreme Court of the United States

OCTOBER TERM, 1947

JACK TRUPIANO, ROMILDO RICCARDELLI, ANTHONY ANTONIOLE AND RIORDAN J. A. ROETT, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The *per curiam* opinion of the circuit court of appeals (R. 133) has not yet been reported. The opinion of the district court (R. 123–127) is reported at 70 F. Supp. 764.

JURISDICTION

The judgment of the circuit court of appeals was entered October 7, 1947 (R. 133–134). The petition for a writ of certiorari was filed November 5, 1947. The jurisdiction of this Court is

invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a search, conducted without a search warrant but as an incident to a valid arrest for crime being committed in the presence of the officers, is unreasonable within the meaning of the Fourth Amendment merely because the officers had opportunity prior to the arrest to obtain a search warrant.

STATEMENT

The four petitioners and three other persons were arrested on the night of June 3, 1946, by investigators of the Alcohol Tax Unit, Bureau of Internal Revenue (R. 3, 10–12). On June 4, 1946, a complaint was sworn out by one of the investigators before a United States Commissioner for the District of New Jersey charging the persons arrested with various violations of the Internal Revenue Code arising out of their ownership and operation of an illicit distillery (R. 8–9). After a preliminary examination before the Commissioner on June 18, 1946 (R. 5–109), petitioners were held to answer in the District Court.[1]

[1] This latter fact does not appear in the printed record, but we have been so informed by the District Attorney for the District of New Jersey. From the same source we learn that petitioners have been indicted for the offenses charged and that the prosecution is pending.

On February 1, 1947, prior to the return of an indictment against them, petitioners filed in the District Court for the District of New Jersey a motion alleging that on the night of the arrest the government agents had illegally seized "a still, alcohol, mash and other equipment," and asking "that all such evidence be excluded and suppressed at any trial * * * and that all of the aforesaid property * * * be returned" (R. 3–4). At the hearing on the motion, petitioners offered in evidence the record of the preliminary examination before the Commissioner (R. 5–109), and the Government submitted affidavits of the agents who took part in the arrest (R. 110–122). The district court held that the search and seizure were not unreasonable and denied the motion (R. 122–128). Upon appeal to the Circuit Court of Appeals for the Third Circuit, the order of the district court was affirmed (R. 133–134).[2]

[2] Where the application for return of seized property is made after an information or indictment has been filed against the applicant, the motion is interlocutory and the order is not appealable. *Go-Bart Co.* v. *United States*, 282 U. S. 344, 356; *Cogen* v. *United States*, 278 U. S. 221, 225. It may be possible that the same rule applies where, as here, the prosecution has not progressed beyond the filing of a complaint and the holding of a preliminary hearing. The cases are not quite clear on the point. See *Go-Bart Co.* v. *United States*, *supra*; *Post* v. *United States*, 161 U. S. 583, 587; *Virginia* v. *Paul*, 148 U. S. 107, 118–122; and see Rules 40 (a), (b) (3) and 48 (a), Federal Rules of Criminal Procedure. However, the appealability of the order was conceded by the Government in the circuit court of appeals and we do not press the point here.

The evidence before the district court came entirely from the government agents and from Kell, the informer, and petitioners concede that it is not in conflict (Pet. 3). So far as it relates to the issues raised by the petition for a writ of certiorari it may be summarized as follows:

During January 1946, petitioner Roett approached Kell and proposed to rent a section of Kell's farm on which Roett would erect a building (R. 84–86). Other meetings followed, during some of which Roett was accompanied by the other three petitioners (R. 45–46, 88–89). Kell became suspicious and reported to an agent of the Alcohol Tax Unit that a still was to be erected in the building (R. 85–87, 92–93). Kell was told by the agents that he could accept Roett's offer provided he did nothing to entice or encourage petitioners into going ahead with their plans (R. 67, 78–80, 93–96). In February, one of the agents, Nilsen, was assigned to act in an undercover capacity, living and working as a hand on the Kell farm; his instructions were, not to entice or encourage petitioners in any manner, but to act the part of a "dumb farm hand" and to accept work at the still if petitioners should offer it (R. 64–66, 72, 116).

Toward the end of March 1946, Kell agreed with petitioners to let them rent part of his property for $300 a month (R. 70–71, 89–91). Kell and Nilsen assisted petitioners in the erection of the building (R. 56, 97, 113), which was

not a dwelling, but a roughly constructed barn (R. 12), situated approximately 200 yards from the Kell farm house (R. 16). Nilsen also assisted in the erection of the still and the vats (R. 56, 113), and after operations were begun on May 13, 1946 (R. 116–117), he acted as "mash man," receiving a salary of $100 a week (R. 52–56, 113). During all this period Nilsen made periodic reports to his superiors and turned over to them samples of the alcohol from the still (R. 50, 70, 75, 113, 114, 117); after May 26, 1946, he used a two-way portable radio set to contact his fellow officers, and on May 31, 1946, he supplied information which led to the seizure of a truckload of alcohol about an hour after it had left the Kell farm (R. 110, 114, 117–118).

Shortly before midnight on June 3, 1946, acting on information from Nilsen that two of the petitioners were at the still, three agents were driven to the farm by Kell in Kell's car. The odor of fermenting mash and the sound of a gasoline motor were noticeable as the car was driven on to the farm premises, and both became stronger as the agents alighted from the car and approached the building housing the still. One of the agents, Van De Car, went around one end of the building and came upon an open door through which he could see in the lighted interior a still column, a boiler, and a gasoline pump in operation. He also saw petitioner Antoniole

bending down near the pump. Acting on the theory that a crime was being committed in his presence he entered the building and placed Antoniole under arrest. (R. 10, 16–21, 111, 114–115, 118–120, 121–122.)

After the arrest, the agent "seized the illicit distillery" (R. 29, 122). He then observed in the building a large number of five-gallon cans which he found to contain alcohol and some vats which contained fermenting mash (R. 13, 122). Another agent, Casey, testified that he could see several of these cans through the open door before he entered, that he later counted the cans and found that there were 262 of them, and that after he entered he saw four large mash vats and other distillery equipment (R. 111–112). A small truck standing in a cleared space before the still house was also searched (R. 120), but it does not appear that anything was taken from it. The other six persons arrested were apprehended later as they arrived at the still premises, and their persons were searched (R. 11–12). The officers did not have a search warrant (R. 15, 75).

ARGUMENT

Petitioners do not dispute that they were validly arrested while committing a felony in the presence of the officers. Their sole contention is that the subsequent search without a warrant was unreasonable, since the agents had, prior to the date of the arrest, full knowledge of the existence

of the still and ample time to obtain a warrant (Pet. 2, 3, 5, 6–10).

However, it has always been considered reasonable to search a person arrested while committing a crime and to search the premises under his immediate control as an incident to the arrest and without applying for a warrant. As this Court said in *Harris* v. *United States*, 331 U. S. 145, 150–151:

> The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant. Search and seizure incident to lawful arrest is a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States and of the individual states.
>
> The opinions of this Court have clearly recognized that the search incident to arrest may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control. Thus in *Agnello* v. *United States* [269 U. S. 20, 30], it was said: "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted."

The authorities cited by petitioners for their contention that a search cannot be made without a warrant, even as an incident to a valid arrest, when the opportunity to obtain a warrant exists, do not support that proposition. In *Taylor* v. *United States*, 286 U. S. 1, *United States* v. *Edelson*, 83 F. 2d 404 (C. C. A. 2), and *In re Milburne*, 77 F. 2d 310 (C. C. A. 2), the agents, suspecting the commission of a crime or the presence of contraband, entered the premises and proceeded to search without a warrant. But in none of these cases was there a prior arrest, followed by an incidental search. Consequently, they have no application in the present situation. The same is true of *Carroll* v. *United States*, 267 U. S. 132. There the issue was the right of federal agents to stop and search an automobile upon reasonable suspicion that it was transporting contraband. This Court recognized "a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motorboat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality". 267 U. S. at 153. However, the Court pointed out that it was discussing situations in which the search was prior to the arrest and was not dependent on the right of arrest; and the Court specifically said, "When a man is legally arrested for an offense,

whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution." 267 U. S. at 158, 159.

We think it proper to point out, although petitioners do not complain on this score, that the record reveals nothing unreasonable about the manner in which the search of the barn was conducted. The still column, the boiler, the pump, and a number of the cans of alcohol were seen through the doorway by the agents; after they entered they "saw" the remainder of the cans, the mash vats and the other distillery equipment (*supra*, pp. 5–6). There is no evidence here of a "general search or rummaging of the place." See *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 358. In fact, the articles would appear to have been "in plain view" of the arresting officers, so that actually "no search for them was made." See *United States* v. *Lefkowitz*, 285 U. S. 452, 465. Nor do we understand petitioners to complain about the searches made of their own persons when they were arrested. It is true that the truck was searched "thoroughly for papers and things of an evidentiary nature" (R. 120). Of course, evidentiary materials, as distinguished from the instrumentalities or fruits of crime, may not be seized even under a search warrant. *Harris* v. *United States*, *supra*, at 154. However, the record reveals no

complaint of any such seizure, and the petition does not raise any such issue. Petitioners' motion in the district court stated that the agents had "unlawfully seized their property, to wit: a still, alcohol, mash and other equipment necessary and appertaining thereto," and asked a return of "the aforesaid property" and the suppression of "all such evidence" (R. 3).[1] These objects are obviously the instrumentalities and the fruits of the crime.

CONCLUSION

The decision of the circuit court of appeals is correct, and no conflict of decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1947.

[1] The notice of the motion to suppress, served upon the United States Attorney, stated that petitioners would seek return of "all papers, records and documents" seized (R. 2). But there is nothing in the record to show that such a request was ever made.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 427

JACK TRUPIANO, ROMILDO RICCARDELLI, ANTHONY ANTONIOLE AND RIORDAN J. A. ROETT, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The *per curiam* opinion of the circuit court of appeals (R. 111) is reported at 163 F. 2d 828. The opinion of the district court (R. 103–106) is reported at 70 F. Supp. 764.

JURISDICTION

The judgment of the circuit court of appeals was entered October 7, 1947 (R. 111–112). The petition for a writ of certiorari was filed Novem-

ber 5, 1947, and was granted December 15, 1947 (R. 113). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a seizure without a warrant of contraband open to view at the time of an arrest for a felony being committed in the presence of the officers, is unreasonable within the meaning of the Fourth Amendment merely because the officers had opportunity prior to the arrest to obtain warrants of arrest and search.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourth Amendment and the statutes involved are set out in the Appendix, *infra*, pp. 47–57.

STATEMENT

The four petitioners and three other persons were arrested on the night of June 3, 1946, by investigators of the Alcohol Tax Unit, Bureau of Internal Revenue (R. 3, 7–9). On June 4, 1946, a complaint was sworn out by one of the investigators before a United States Commissioner for the District of New Jersey charging the persons arrested with various violations of the Internal Revenue Code arising out of their ownership and operation of an illicit distillery (R. 6–7). After a preliminary examination before the Commis-

sioner on June 18, 1946 (R. 4–93), petitioners were held to answer in the District Court.[1]

On February 5, 1947, prior to the return of an indictment against them, petitioners filed in the District Court for the District of New Jersey a motion alleging that on the night of the arrest the government agents had illegally seized "a still, alcohol, mash and other equipment," and asking "that all such evidence be excluded and suppressed at any trial * * * and that all of the aforesaid property * * * be returned" (R. 3). At the hearing on the motion, petitioners offered in evidence the record of the preliminary examination before the Commissioner (R. 4–93), and the Government submitted affidavits of the agents who took part in the arrest (R. 93–103). The district court held that the search and seizure were not unreasonable and denied the motion (R. 103–107). Upon appeal to the Circuit Court of Appeals for the Third Circuit, the order of the district court was affirmed (R. 111–112).

The evidence before the district court came entirely from the government agents and from Kell, the informer. So far as it relates to the

[1] This latter fact does not appear in the printed record, but we have been so informed by the United States Attorney for the District of New Jersey. From the same source we learn that petitioners have been indicted for the offenses charged and that the prosecution is pending.

issues raised by the petition for a writ of certiorari it may be summarized as follows:

During January 1946, petitioner Roett approached Kell and proposed to rent a section of Kell's farm on which Roett would erect a building (R. 70–73). Other meetings followed, during some of which Roett was accompanied by the other three petitioners (R. 38–39, 74–76). Kell became suspicious and reported to an agent of the Alcohol Tax Unit that a still was to be erected in the building (R. 72–73, 78–79). Kell was told by the agents that he could accept Roett's offer provided he did nothing to entice or encourage petitioners into going ahead with their plans (R. 56, 65–67, 79–82). In February, one of the agents, Nilsen, was assigned to act in an undercover capacity, living and working as a hand on the Kell farm; his instructions were, not to entice or encourage petitioners in any manner, but to act the part of a "dumb farm hand" and to accept work at the still if petitioners should offer it (R. 54, 60, 96–98).

Toward the end of March 1946, Kell agreed with petitioners to let them rent part of his property for $300 a month (R. 59, 76–77). Kell and Nilsen assisted petitioners in the erection of the building (R. 47, 82–83, 95), which was not a dwelling, but a roughly constructed barn (R. 9), situated approximately 200 yards from the Kell farm house (R. 13). Nilsen also assisted in the erection of the still and the vats (R. 47, 95).

Operation of the still commenced about May 13, 1946 (R. 98). Nilsen acted as "mash man," receiving a salary of $100 a week (R. 44–47, 95). During all this period Nilsen made periodic reports to his superiors and turned over to them samples of the alcohol from the still (R. 42–43, 58–59, 63, 95–96, 98–99); after May 26, 1946, he used a two-way portable radio set to contact his fellow officers, and on May 31, 1946, he supplied information which led to the seizure of a truckload of alcohol about an hour after it had left the Kell farm (R. 93–94, 96, 98–99).

At about 9:00 P. M. in the evening of June 3, 1946, Nilsen informed his superior that the still operators were awaiting the arrival of a load of sugar and that alcohol was to be taken from the farm when the sugar truck arrived (R. 99). At about 11:00 P. M. Nilsen reported that the truck had been delayed but that Roett and Antoniole were at the still (R. 99–100).

At about 11:45 three agents were driven to the farm by Kell in Kell's car (R. 94).

The odor of fermenting mash and the sound of a gasoline motor were noticeable as the car was driven on to the farm premises, and both became stronger as the agents alighted from the car and approached the building housing the still. One of the agents, Van De Car, went around one end of the bulding and came upon an open door through which he could see in the

lighted interior a still column, a boiler, and a gasoline pump in operation. He also saw petitioner Antoniole bending down near the pump. Acting on the theory that a crime was being committed in his presence, he entered the building and placed Antoniole under arrest. (R. 7–8, 12–17, 94, 96, 99–100, 102.)

After the arrest, Van De Car "seized the illicit distillery" (R. 24, 102). He then observed in the building a large number of five-gallon cans which he found to contain alcohol and some vats which contained fermenting mash (R. 10, 103). Another agent, Casey, testified that he could see several of these cans through the open door before he entered, that he later counted the cans and found that there were 262 of them, and that after he entered he saw four large mash vats and other distillery equipment (R. 94). A small truck standing in a cleared space before the still house was searched by another agent, Gettel (R. 100), but it does not appear that anything was taken from it.

The other six persons arrested were apprehended later (R. 8–9). Among that group was one Pugliese who arrived with a truck loaded with coke (R. 61). Nilsen had never seen Pugliese before he was apprehended (R. 31).

The officers did not have a search warrant or warrants of arrest (R. 12, 63).

SUMMARY OF ARGUMENT

In this case, agents, making an arrest for a felony committed in their presence, seized contraband, open to view, constituting the instrumentalities of the very crime for which the arrest was made. The question is whether the right to arrest and seize, otherwise well-established, is affected by the circumstance that, under the facts of this particular case, there was time to secure warrants both for the arrest and the seizure.

A. Historically, a warrant of arrest has never been required to justify an arrest for a felony even though there is time to obtain a warrant. English and American cases have specifically so held. *Davis* v. *Russell,* 5 Bing. 354; *Holley* v. *Mix,* 3 Wend. (N. Y.) 350; *Rohan* v. *Sawin,* 5 Cush. (Mass.) 281; *Wade* v. *Chaffee,* 8 R. I. 224.

As to the particular offenses here involved, the common law has received the additional support of specific congressional legislation empowering marshals to arrest without a warrant. 18 U. S. C. 593. The powers thus conferred on marshals have, we believe, also been conferred on agents of the Alcohol Tax Unit by Sec. 3121 (a) of the Internal Revenue Code (26 U. S. C. 3121 (a)). But even if agents have only the powers of arrest under state law, the common law pertains in New Jersey where this arrest was made. *Delafoile* v. *State,* 54 N. J. L. 381. Hence the arrest without a warrant was lawful.

It is submitted that a right to arrest recognized as not in conflict with the Fourth Amendment since the time of its adoption, cannot now be deemed unconstitutional.

B. Since the arrest was lawful, seizure of contraband open to view at the time of the arrest was also lawful. The right, at the time of a lawful arrest, to seize instrumentalities of the crime for which the arrest is made is supported by a long, unbroken line of English and American authorities. It has been recognized by numerous decisions of this Court from *Weeks* v. *United States,* 232 U. S. 383, 392, through *Harris* v. *United States,* 331 U. S. 145, and never yet questioned.

The seizure provisions of Section 3116 of the Internal Revenue Code do not require a warrant to justify the seizure of contraband where entry has been lawfully made for a purpose other than search, and where the property declared contraband by that section is open to view or lawfully uncovered. *Steele* v. *United States No. 1,* 267 U. S. 498. A search warrant has no function to serve in such circumstances since the breach of privacy, pursuant to the lawful entry, has already occurred.

Time to obtain a warrant becomes of the essence only where the entry is made for the pur-

pose of search or seizure, and not for some other lawful purpose. In such circumstances, a warrant serves as a key to unlock the doors of privacy and a warrant must, if practicable, be obtained. The decisions of this Court discussing the time element have all involved situations where the entry was made for the specific purpose of searching or seizing and not for some other purpose. *Johnson* v. *United States*, No. 329, this Term, decided Feb. 2, 1948; *Taylor* v. *United States*, 286 U. S. 1; *Carroll* v. *United States*, 267 U. S. 132; *Go-Bart Co.* v. *United States*, 282 U. S. 344, 358.

In the case of seizure of contraband open to view at time of an arrest, the factor of opportunity to obtain a warrant goes to the reasonableness of the arrest, and not of the seizure. The reasonableness of the right to arrest without a warrant is a matter for legislative, and not judicial judgment.

ARGUMENT

Since, historically, an arrest without a warrant for a felony is lawful although there is time to obtain a warrant, seizure of contraband without a warrant at the time of arrest is also lawful.

Considering, in isolation, the events which occurred on the night of June 3, when petitioners were arrested and the property involved in the present proceeding was seized, we have the following situation:

Agents of the Alcohol Tax Unit, having reason to suspect that an illegal still is being operated on certain premises, enter the farm upon which the suspected still is located with the consent of the owner of the farm. The operation of an illegal still involves the commission of a number of felonies (see Appendix, *infra*, pp. 47–50). As they approach a crude building, obviously not a registered distillery (see, *infra*, p. 33), about 200 yards from the farm house, the odor of fermenting mash and the sound of a gasoline motor are very marked. Through an open door in the building, they see a still with a gasoline pump in operation and someone bending down near the pump. They arrest the man at the still and seize the still which is open to view. They also see in open view vats containing fermenting mash, other distillery equipment, and cans normally used for alcohol. They seize these articles as well. While the agents are making the seizure, other persons, obviously familiar with the premises, arrive about midnight, some with materials clearly intended for use at the still. Such persons are also placed under arrest. Other persons, known to be involved in the illegal operations, are also arrested.

Were those facts the complete picture, we think there could be no question about the validity either of the arrests or of the seizure of the property here involved. It is to be noted that we have here a case involving seizure of contra-

band open to view, and not a case involving a right of search incident to an arrest.[2]

The right of law enforcement officers to arrest for a felony committed in their presence has never been questioned. See *Carroll* v. *United States*, 267 U. S. 132, 156–157; *Kurtz* v. *Moffitt*, 115 U. S. 487, 504. And the right to seize instrumentalities of the crime, which are in themselves contraband, at the time the arrest is made, at the place where the offense is being committed, has been recognized and, where necessary, upheld in numerous decisions of this Court. See pp. 28–32, *infra*.

The question in this case is whether those well-established rights are affected by the circumstance that, in this particular case, before the arrest and the seizure of the still and the other materials, the agents had sufficient time and information to obtain warrants, both for the

[2] In the affidavit submitted by agent Gettel on behalf of the Government, he stated that he had searched a truck in the clear space in front of the still house "for papers and things of an evidentiary nature" (R. 100). It does not appear that anything was taken from the truck. Petitioners in this action seek the return of "a still, alcohol, mash, and other equipment necessary and appertaining thereto" (R. 3). Those articles had been seized by agents Van De Car and Casey (R. 94, 102–103), before Gettel's search of the truck and independently of Gettel's search of the truck (See R. 100). Since, therefore, the present proceeding does not relate to the truck or anything found therein, this case presents only the problem of the right to seize contraband irrespective of whether the search of the truck was or was not justified.

arrest and for the seizure. We consider that issue, first in relation to the arrest and then in relation to the seizure.

A. *Historically, and by statute, a warrant of arrest is not necessary to arrest for a felony even where there is time to obtain a warrant.*—As to the arrest, the question at issue, i. e., whether a warrant of arrest must be obtained when law enforcement officers have sufficient time and information to obtain one, has been answered in the negative by several hundred years of history. It has never been the law, in the absence of specific legislation to such effect, that warrants of arrest must be obtained to make an arrest for a felony. To the contrary, at the time of the adoption of the Constitution and ever since, except where the rule has been changed by statute, it has been established law, in England and in federal and state courts, that a law enforcement officer or a private citizen may make an arrest for a felony committed in his presence, where a felony has in fact been committed; and that a peace officer may arrest on reasonable cause to believe that a felony has been committed and that the person arrested has committed it. 2 Hale, *Pleas of the Crown,* pp. 73–98; 4 Blackstone, *Commentaries,* 290–295; 2 Hawkins, *Pleas of the Crown,* pp. 115–137; Wilgus, *Arrest Without a Warrant,* 22 Mich. L. Rev. 541, 673, particularly at 548–550 and 685–689; *Car-*

roll v. *United States,* 267 U. S. 132, 156–157; *Kurtz* v. *Moffitt,* 115 U. S. 487, 504; *Rohan* v. *Sawin,* 5 Cush. (Mass.) 281, 284–285 (1850); *Wakely* v. *Hart,* 6 Binn. (Pa.), 316, 318–319 (1814); *Samuel* v. *Payne,* 1 Doug. K. B. 359 (1780); *Beckwith* v. *Philby,* 6 B. & C. 635 (1827).

As the article by Wilgus, cited above, makes clear, the power to arrest without a warant preceded the development of warrant procedure and was never supplanted by the warrant procedure. In fact, in the period immediately preceding the American Revolution, the invasion of personal liberty resulted, not from the conduct of law enforcement officers acting without a warrant, but from the abusive use of warrants. Thus, the evil of the warrant involved in *Entick* v. *Carrington,* 19 How. St. Tr. 1029, arose from the fact that it empowered the executive officers to do that which they could not do without a warrant, i. e., arrest on suspicion without probable cause. Similarly, the writs of assistance were warrants. And when the Fourth Amendment to the Constitution provided that no warrants should issue except on probable cause, it was certainly, at least in part, designed to make certain that warrants should not be used to authorize arrests which could not be made without a warrant.

The specific issue of whether a warrant of arrest must be obtained by a constable when there is time for him to obtain one was raised in the

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English case of *Davis* v. *Russell*, 5 Bing. 354, decided in 1829; the Court of Common Pleas there held that a warrant was not necessary. Best, C. J., said (5 Bing. at 363):

> It has been further contended, that without a warrant from a magistrate a constable has no right to apprehend upon suspicion, unless there be danger of escape if he forebear to apprehend. The law, however, is not so.

Gaselee, J., said (5 Bing. at 368):

> As to the point about the probability of escape, none of the authorities cited go the length of saying that the constable cannot detain, except where he has reason to apprehend an escape.

That decision, announced within forty years after the adoption of the Fourth Amendment, obviously reflects the state of the common law at the time that Amendment was adopted.

The same issue was also raised in early American state cases and it was again specifically held that a warrant need not be obtained even though there was time to obtain one. *Holley* v. *Mix*, 3 Wend. (N. Y.) 350–353 (1829); *Rohan* v. *Sawin*, 5 Cush. (Mass.) 281, 286 (1850); *Wade* v. *Chaffee*, 8 R. I. 224, 225 (1865).

Inasmuch as the Fourth Amendment must be interpreted in the light of the common law as it existed when the Amendment was adopted (*Carroll* v. *United States*, 267 U. S. 132, 149), it is

clear that there is no constitutional requirement that a law enforcement officer must obtain a warrant of arrest when he has time to do so, on pain of having the arrest held invalid.

As to particular offenses here involved, the common law of arrest has received the additional support of specific congressional legislation. By Section 9 of the Act of March 1, 1879, c. 125, 20 Stat. 327, 341, Congress provided that—

> Where any marshal or deputy marshal of the United States within the district for which he shall be appointed shall find any person or persons in the act of operating an illicit distillery, it shall be lawful for such marshal or deputy marshal to arrest such person or persons, and take him or them forthwith before some judicial officer named in section one thousand and fourteen of the Revised Statutes, who may reside in the county of arrest or if none, in that nearest to the place of arrest, to be dealt with according to the provisions of sections ten hundred and fourteen, ten hundred and fifteen, ten hundred and sixteen of the said Revised Statutes.

That provision, still in force (18 U. S. C. 593), was passed at a time when United States marshals were in fact, as well as in theory, the law enforcement officers, the "peace officers," of the United States. See *In re Neagle*, 135 U. S. 1, 59. The powers thus given to the marshals were subsequently conferred on the particular agents who

in later times were given the duty of enforcing federal laws relating to intoxicating liquor. Section 28 of the National Prohibition Act of October 28, 1919, c. 85, Title II, 41 Stat. 305, 316, provided:

> The commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States.

After Repeal, when new legslation was necessary to enforce the remaining federal laws relating to distilled spirits, the Liquor Law Repeal and Enforcement Act of August 27, 1935, c. 740, 49 Stat. 872, 875, provided in Section 9:

> The Commissioner, his assistants, agents, and inspectors, and all other officers, employees, or agents of the United States, whose duty it is to enforce criminal laws, shall have all the rights, privileges, powers, and protection in the enforcement of the provisions of this title and of Title III of the National Prohibition Act, which are conferred by law for the enforcement of any laws in respect of the taxation, importation, exportation, transportation, manufacture, possession, or use of, or traffic in, intoxicating liquors.

That provision now appears as Section 3121 (a) of the Internal Revenue Code (26 U. S. C. 3121 (a)).[3]

We submit that this section is clearly sufficient to confer upon the Commissioner and his agents the power, given to a marshal by 18 U. S. C. 593, to arrest wthout a warrant persons operating an illegal distillery.

However, only one district court decision has specifically so held. *United States* v. *Daison*, 288 Fed. 199, 203 (E. D. Mich.). Apart from that ruling, despite the many cases of arrests and seizures by prohibition agents and agents of the Alcohol Tax Unit during and after prohibition,

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[3] In 1939, Section 9 of the 1935 act was codified with the provisions of Title III of the National Prohibition Act relating to industrial alcohol and, as codified, was enacted as part of the Internal Revenue Code, 53 Stat. 363. It is clear, however, that the powers conferred by that section were not intended to be confined to the enforcement of laws relating to industrial alcohol alone. Section 3116 of the Internal Revenue Code (Section 8 of the Act of August 27, 1935) has been similarly codified although by its terms it expressly provides that:

"It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this title, or of Title III of the National Prohibition Act, or the internal revenue laws * * *."

The courts have treated Section 3116 as not being limited to industrial alcohol. *Kent* v. *United States*, 157 F. 2d 1 (C. C. A. 5); *Seib* v. *United States*, 150 F. 2d 673 (C. C. A. 8); *United States* v. *52 Cases Distilled Spirits*, 62 F. Supp. 749 (E. D. La.); *United States* v. *One 1942 Pontiac Sedan Automobile*, 56 F. Supp. 929 (E. D. Ill.); *United States* v. *3935 Cases of Distilled Spirits*, 55 F. Supp. 84 (D. Minn.).

there appears to be no authoritative decision on the question of the exact statutory basis of their power to arrest. This Court in some of its leading cases during the prohibition period, *Marron* v. *United States*, 275 U. S. 192, 198; *Go-Bart Co.* v. *United States*, 282 U. S. 344, 356, cases not involving illegal distilleries, assumed that prohibition agents did have the power to arrest without a warrant without specifying the basis of that power. In *Scher* v. *United States*, 305 U. S. 251, this Court made the same assumption as to agents of the Alcohol Tax Unit enforcing liquor laws after the repeal of prohibition, recognizing their power to search a moving vehicle despite the absence of a provision similar to Section 26 of the National Prohibiton Act specifically imposing on agents the duty to seize liquor being illegally transported.[4] Lower federal courts, usually without discussion, have consistently upheld the power of agents to arrest and seize, both before[5] and after[6] Repeal.

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[4] The majority opinion in *United States* v. *Di Re*, 332 U. S. 581, 589-587, does not mention or cite the *Scher* case.

[5] *Crace* v. *United States*, 44 F. 2d 894, 895 (App. D. C.); *Martin* v. *United States*, 62 F. 2d 215, 217 (C. C. A. 1), certiorari denied, 288 U. S. 617; *Rouda* v. *United States*, 10 F. 2d 916, 918 (C. C. A. 2); *Benton* v. *United States*, 28 F. 2d 695, 697 (C. C. A. 4); *Todd* v. *United States*, 48 F. 2d 530, 532 (C. C. A. 5); *Cardinal* v. *United States*, 79 F. 2d 825, 826 (C. C. A. 6); *Wida* v. *United States*, 52 F. 2d 424 (C. C. A. 8); *Miller* v. *United States*, 9 F. 2d 382, 383 (C. C. A. 9); *Williams* v. *United States*, 66 F. 2d 868, 869 (C. C. A. 10).

[6] *Shew* v. *United States*, 155 F. 2d 628 (C. C. A. 4), cer-

Implicit in these decisions, we think, is the thought that prohibition or alcohol tax unit agents are, at the very least, peace officers of the United States, for the purpose of enforcing the laws relating to liquor. The decisions recognize their right to search and seize as well as to arrest, and it is, we think, doubtful whether the right to search and seize would pertain to private citizens making an arrest. See also, *Steele* v. *United States No. 2*, 267 U. S. 505, 509, where this Court held that prohibition agents were authorized to execute search warrants under the Espionage Act, and *Maryland* v. *Soper* (*No. 1*), 270 U. S. 9, where this Court held that prohibition agents were revenue agents within the provisions of Section 33 of the Judicial Code, conferring the right to have a state prosecution for an offense committed in the course of duty removed to a federal court for trial.

Congress also has treated agents of the Alcohol Tax Unit as peace officers in Section 201 of the Liquor Repeal and Enforcement Act of 1935 (18 U. S. C. 53a), for, when reenacting the provision of the prohibition act making it a penal offense for an officer to search a dwelling house without a warrant, it added the proviso—

Provided, That nothing herein contained

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tiorari denied, 328 U. S. 870; *United States* v. *Feldman*, 104 F. 2d 255 (C. C. A. 3), certiorari denied, 308 U. S. 579; *Crabb* v. *United States*, 99 F. 2d 325, 327 (C. C. A. 10); *Papani* v. *United States*, 84 F. 2d 160, 162 (C. C. A. 9).

> shall apply to any officer, agent, or employee of the United States serving a warrant of arrest, or arresting or attempting to arrest any person committing or attempting to commit an offense in the presence of such officer, agent, or employee, or who has committed, or who is suspected on reasonable grounds of having committed, a felony.

The statute clearly assumes that the agents here involved have power to arrest, search and seize.

It is true that Section 3117 (a) of the Internal Revenue Code (Appendix *infra*, p. 51) lists the duties of the Commissioner and agents as investigating, reporting and obtaining warrants of arrest without mentioning the power to arrest without a warrant. That provision stems from Section 3 of the Liquor Repeal and Enforcement Acts (Appendix *infra*, p. 55) which reenacted the provisions of Section 2 of the National Prohibition Act (Appendix *infra*, p. 52). Yet, as we have shown, the power of agents to arrest without a warrant was assumed and recognized by the decisions of this Court and of the lower federal courts throughout the prohibition era.

It is to be noted that Section 2 of the Prohibition Act and its successors all provided that the provisions of R. S. 1014 (18 U. S. C. 591) should be deemed applicable in the enforcement of the laws relating to liquor. R. S. 1014, governing proceedings for arrest and admission to bail by United States Commissioners and state officers

"agreeable to the usual mode of process against offenders in such state," has been interpreted as rendering the state law of arrest without a warrant applicable to arrests for federal offenses. See *Cline* v. *United States*, 9 F. 2d 621 (C. C. A. 9). While the decisions of the prohibition era do not specify whether the power of agents to arrest without a warrant arises from this part of Section 2, or from the general powers of enforcement conferred by Section 28, they do make it clear that agents were deemed to have the power to arrest without a warrant. Congress therefore could not have meant to take away that power when it reenacted Sections 2 and 28 of the Prohibition Act as Sections 3 and 9 of the Liquor Repeal and Enforcement Act. On the contrary, as we have shown, Section 201 (a) of the Liquor Repeal and Enforcement Act clearly assumes that agents have the power to arrest without a warrant.

Therefore, if it should now be held that no federal statute governs the right to arrest for the offenses here involved by persons other than marshals, then the agents of the Alcohol Tax Unit would have the rights conferred on peace officers by state law in the state where the arrest is made. *United States* v. *Di Re*, 332 U. S. 581, 588–591. In New Jersey, where this arrest was made, the common law of arrest governs. *Delafoile* v. *State*, 54 N. J. L. 381, 383. As

set forth above, a law enforcement officer has the right at common law to arrest for a felony committed in his presence or on probable cause to believe that a felony has been committed, whether or not he has an opportunity to obtain a warrant for such arrest. Hence, under either federal or state law, the officers had authority to arrest petitioners without a warrant even though they could have obtained a warrant of arrest.[1]

There may be differences of opinion as to the wisdom of the common law policy in regard to arrests without a warrant and its statutory codification in regard to arrests for operation of illegal distilleries. Congress has itself indicated a different policy as to F. B. I. agents whom it has authorized to make arrests for felonies without warrants "where there is a likelihood of the person escaping before a warrant can be obtained for his arrest." Act of June 18, 1934, c.

[1] The general state law of arrest, rather than a state statute governing a particular state offense, would, of course, govern the power to arrest for the federal offenses here involved. Hence, Section 33: 2–3 of the New Jersey Revised Statutes, cited by petitioner (Br. 29–30), has no significance here, even though that statute relates to the same subject matter as the federal offenses for which the arrest was made. The inapplicability of the New Jersey statute in determining the power to arrest for the federal offenses is particularly apparent in this case because of the fact that possession of an illegal distillery is a misdemeanor under state law, whereas under federal law it is a felony. It is worth noting, moreover, that in providing for investigation "under proper search warrant when necessary," the New Jersey statute recognizes that a search warrant is not necessary in all cases.

595, 48 Stat. 1008; Act of March 22, 1935, c. 39, 49 Stat. 77, 5 U. S. C. 300a. The older policy has been left in force as to illegal distilleries, whether 18 U. S. C. 593 governs, or whether the agents are relegated to their right of arrest under state law. That policy may be a mere accident of history, or it may represent a deliberate decision based on the fact that, in this type of offense, the identification of the offenders is seldom as explicit as it was in this case. The more usual pattern is for agents to receive, through their senses or through other sources of information, knowledge merely that an illegal still is being operated without precise knowledge of the identity of the principal offenders. The normal procedure is to watch for a time when it seems likely that the principal offenders, and not merely some unimportant workman, will be at the still, and thus identify and arrest the principal violators. Even in this case, it seems evident that the still was allowed to operate as long as it was in the hope of obtaining further information as to other members of the ring. And it is significant that, with all the sources of information available to the Government in this case, the raid on the night of June 3 resulted in the apprehension of an offender not previously known to the government undercover agent. See Statement, *supra*, p. 6. This may appear to be an argument of convenience but, even on that footing, it is an argument of convenience which has

the force of centuries of common law history behind it.

In any event, whatever one's individual judgment as to the desirability or undesirability of allowing law enforcement officers to make an arrest without a warrant when there is time to get a warrant, it is clear that a right which has been recognized as constitutional at the time of and since the adoption of the Fourth Amendment, cannot now be deemed in violation of that Amendment. If changes are to be made, it is for the legislature and not the courts to make them.

B. *Since the arrest was lawful, the seizure of contraband open to view at the time of arrest was also lawful.*—Since, as we have shown, the arrest of petitioners without warrants of arrest was lawful, it follows as a matter of course that the officers had the right, at the time of arrest at the place where the offense was being committed, to seize articles open to view, which not only constituted the instrumentalities of the crimes for which the arrest was made, but were articles of contraband in which, by statute (26 U. S. C. 3116), petitioners could have no property right whatsoever.

As pointed out above, there is no occasion in this case to reexamine the question decided by this Court in *Harris* v. *United States*, 331 U. S. 145, as to the permissible extent of a search incident to a lawful arrest. We have here a case, not of search, but of seizure of contraband open to view, contraband which constituted the means of com-

mitting the very crime for which the arrest was made. The right to seize this type of property at the time an arrest is made, without a search warrant, is established not only by the consistent practice which we detailed in our brief in the *Harris* case, but by a long, unbroken line of reported decisions in state, federal and English courts.

In one of the earliest reported cases dealing with search and seizure, *Banks* v. *Farwell,* 21 Pick. 156, decided by the Supreme Judicial Court of Massachusetts in 1839, when writs of assistance could still be recalled by living men, the court held that, where an accused, arrested outside his shop under a warrant of arrest for larceny, stated that the stolen property was in his shop, the arresting officer had the right to break into the premises without permission and take the stolen chattels. The action of the arresting officer was justified under a statute passed in 1804—very soon after the adoption of the Fourth Amendment—which made it the duty of the "officer who shall be lawfully employed in apprehending and arresting any person accused of the crime of larceny, to seize and secure the money, goods or other articles alleged to be stolen which shall be found in the possession of such accused person." The statute thus found to authorize the seizure without warrant was upheld against a claim that it violated the Massachusetts equivalent of the Fourth Amendment. The court said (21 Pick. at 159)—

It would be imputing to the law a dis-

> graceful degree of imbecility, to hold that it would not authorize the seizure of this property.

In *Houghton* v. *Bachman,* 47 Barb. (N. Y.) 388 (1866), the court upheld the taking of stolen property at the time of the arrest despite the fact that it found a warrant to search for the property to be invalid. In speaking of the power of the court to seize the fruits of crime open to view, the court said (47 Barb. at 392):

> The ends of justice demand that this power should exist, and the common law and its usages have sanctioned its exercise from time immemorial.[8]

In *Kneeland* v. *Connally,* 70 Ga. 424, 425 (1883), the court, in upholding the seizure of gaming equipment at the time of arrest of the offender said:

> * * * * The warrant to seize the keeper of the unlawful house or room carries with it the power or legal authority to seize the implements of his crime, just as a warrant to arrest a man charged with murder would carry with it authority to seize the bloody knife or smoking pistol which killed; or a warrant to arrest a counterfeiter would include the legal seizure of his tools for counterfeiting. No separate warrant is necessary in either case.

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[8] New York did not at the time have a constitutional provision similar to the Fourth Amendment but it did embody the same provisions in a statute. New York Revised Statutes (1829) V. 1, c. IV, sec. 11.

In *State* v. *Robbins,* 124 Ind. 308, 311 (1890), the court expressed the view that gaming equipment was properly seized without warrant at the time of the arrest of the offender even though a state statute authorized the issuance of a search warrant for such property. The court there said:

> If, without resorting to the statute, the proper officer of the court obtained possession of the articles, or things, used in the commission of a crime, in some other manner equally lawful and legitimate, the jurisdiction of the court over the subject would be the same as if it had been first taken by a search warrant, and turned over to the sheriff. In other words, so far as the court has jurisdiction over the property or thing, its jurisdiction depends upon the fact that the apparatus shall be properly in the custody of the sheriff, when the offender is before the court for trial, and not that he shall have obtained the custody by means of a search warrant. * * *

The English authorities are to the same effect. *Dillon* v. *O'Brien,* 20 L. R. Ir. 300, 314, 16 Cox C. C. 245 (1887); *Tyler and Witt* v. *London and S. W. R. Co.,* Cab. & El. 285, 286 (1884); *Elias* v. *Pasmore,* [1934] 2 K. B. 164.

From the time that this Court first undertook to outlaw evidence seized as the result of an illegal search, it has recognized that a warrant is not required to seize instrumentalities of the crime open to view at the time an arrest was made.

Thus, in *Weeks* v. *United States*, 232 U. S. 383, 392, this Court recognized the right to search for instrumentalities of the crime, as a separate, well-established category, independent of the right to search the person, saying that the case before it was not "the case of burglar's tools or other proofs of guilt found upon his arrest within the control of the accused."

In *Carroll* v. *United States*, 267 U. S. 132, 158, holding that a warrant was not necessary to justify the search of a moving vehicle, the Court said:

> When a man is legally arrested for an offense, whatever is found upon his person or in his control which is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution.

In *Agnello* v. *United States*, 269 U. S. 20, 30, this Court, in eliminating from the case the question of the validity of the search and seizure at the place where the defendant was arrested, said:

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.

> See *Carroll* v. *United States*, 267 U. S. 132, 158; *Weeks* v. *United States*, 232 U. S. 383, 392. The legality of the arrests or of the searches and seizures made at the home of Alba is not questioned. Such searches and seizures naturally and usually appertain to and attend such arrests. * * *

In *United States* v. *Lee*, 274 U. S. 559, 563, in upholding the search of a motorboat and the seizure of liquor found therein, this Court gave as an alternative reason for upholding the search and seizure the fact that the search, if any, was made "as an incident of a lawful arrest."

In *Marron* v. *United States*, 275 U. S. 192, 198–199, in upholding as incident to a lawful arrest the seizure of documents not in themselves contraband, not mentioned in a search warrant, this Court said:

> * * * The officers were authorized to arrest for crime being committed in their presence, and they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. * * *

In *Go-Bart Co.* v. *United States*, 282 U. S. 344, 358, in distinguishing the case before it from the *Marron* case, this Court said:

> Plainly the case before us is essentially different from *Marron* v. *United States*, 275 U. S. 192. There, officers executing a

valid search warrant for intoxicating liquors found and arrested one Birdsall who in pursuance of a conspiracy was actually engaged in running a saloon. As an incident to the arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. These things were visible and accessible and in the offender's immediate custody. There was no threat of force or general search or rummaging of the place.

Similarly in *Lefkowitz* v. *United States*, 285 U. S. 452, 465, this Court said:

> These searches and seizures are to be distinguished from the seizure of a ledger and some bills that was sustained in the *Marron* case. There, prohibition officers lawfully on the premises searching for liquor described in a search warrant, arrested the bartender for crime openly being committed in their presence. He was maintaining a nuisance in violation of the Act. The offense involved the element of continuity, the purchase of liquor from time to time, its sale as a regular thing for consumption upon the premises and other transactions including the keeping of accounts. The ledger and bills being in plain view were picked up by the officers as an incident of the arrest. No search for them was made. The ledger was held to be part of the outfit actually used to commit the offense. The bills were deemed so closely related to the business that it was not un-

> reasonable to consider them as employed to carry it on. While no use was being made of the book or papers at the moment of the arrest, they—like containers, chairs and tables for customers, the cash register, glasses and supplies were kept to be utilized when needed. The facts disclosed in the opinion were held to justify the inference that when the arrest was made the ledger and bills were in use to carry on the criminal enterprise.

In its recent decision on the subject, *Harris* v. *United States*, 331 U. S. 145, 150–151,[9] this Court said:

> * * * Search and seizure incident to lawful arrest is a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States and of the individual states.

The dissenting opinion of Mr. Justice Frankfurter in that case recognizes the difference between a search incident to a legal arrest and the situation in which contraband "in plain view" is "picked up by the officers as an incident to the arrest" (331 U. S. at 169), and the dissenting opinion of Mr. Justice Murphy explains the prior decisions of this Court, discussed above, as follows (331 U. S. at 186):

> It is undoubtedly true that limited seizures may be made without the benefit

[9] In *Johnson* v. *United States*, No. 329, this Term, decided Feb. 2, 1948, the arrest was held to be unlawful.

> of search warrants under certain circumstances where a person has been arrested in his home. Due accommodation must be made for the necessary processes of law enforcement. Seizure may be made of articles and papers on the person of the one arrested. And the arresting officer is free to look around and seize those fruits and evidences of crime which are in plain sight and in his immediate and discernible presence. * * *

In the type of situation here involved, where the property seized incident to the arrest is contraband in the true sense and is open to view at the time of arrest, the arrest is significant only to the extent that it legalizes the entry of the officers into the premises. Cf. *Johnson* v. *United States*, No. 329, this Term, decided Feb. 2, 1948. The right of the officers to seize does not depend on the right to arrest. The right to seize arises from the fact that, in a place where they have lawfully entered, they see before their eyes property the very possession of which is a crime. Time and again, the Internal Revenue Code declares that the type of property here involved is property which cannot lawfully be possessed. For example, Section 3116 of the Internal Revenue Code provides:

> It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws, or regulations pre-

scribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property. * * *

See also Sections 2810, 2814 and 2833 of the Internal Revenue Code, Appendix, *infra*, pp. 47–50.

Experienced agents would have no difficulty in ascertaining at a glance that the distillery here involved was property forfeit under all those provisions of the Internal Revenue Code. The shed in which the still was housed very obviously failed to comply with the regulations governing specifications for the construction of distillery buildings (26 C. F. R. Cum. Supp., c. I, Sec. 183.10–183.29). The shed obviously carried no sign reading "Registered Distillery" as required by Section 2831 of the Internal Revenue Code. Thus, when the agents came into the shed to make the arrest—an entry which, as we have shown, they could lawfully make without a warrant—they found before them apparatus which by law was forfeit to the United States, apparatus in which petitioners neither had nor could have any property right whatsoever. It was their duty as well as their right to take possession of that property.

This Court has always recognized that where, in the course of his lawful duties, an officer has come upon property which is contraband in the true sense, the officer may seize the property without a warrant. *Harris* v. *United States*, 331 U. S. 145; *Steele* v. *United States No. 1*, 267 U. S. 498;

see *Adams* v. *New York*, 192 U. S. 585, 598; *Zap* v. *United States*, 328 U. S. 624.

It was on this theory that the seizure of the draft cards, turned up in the course of a lawful search, was upheld in the *Harris* case although the agents were not searching for draft cards. In *Steele* v. *United States No. 1*, 267 U. S. 498, a search warrant authorized search of the premises for a number of cases believed to contain whiskey. Search disclosed, and the agents seized, not only 150 cases of whiskey, but also 92 kegs of whiskey, a 5-gallon can of alcohol, 66 cases of gin, six 5-gallon jugs of whiskey, 102 quarts of whiskey, two 50-gallon barrels of whiskey, and a corking machine. This Court held that the property was lawfully seized, and affirmed a decree holding that it should not be returned.[10]

Lower federal courts have consistently followed the same rule. *Bennett* v. *United States*, 145 F. 2d 270 (C. C. A. 4), certiorari denied, 323 U. S. 788 (search warrant for counterfeiting apparatus justifies seizure of counterfeit ration coupons); *In re 14 East 17th Street*, 65 F. 2d 289 (C. C. A. 2) (smuggled goods discovered after entry by consent); *Paper* v. *United States*, 53 F. 2d 184 (C. C. A. 4) (liquor found during search for

[10] *Marron* v. *United States*, 275 U. S. 192, 196, holding that a ledger, etc., could not lawfully be seized under a search warrant because not mentioned therein, is not to the contrary, since the articles there involved were not in themselves contraband.

defendant whose arrest was sought on a bench warrant); *United States* v. *Two Soaking Units, Etc.*, 48 F. 2d 107 (C. C. A. 2), certiorari denied, 284 U. S. 627 (contraband discovered during lawful inspection); *Hilsinger* v. *United States*, 2 F. 2d 241 (C. C. A. 6), certiorari denied, 266 U. S. 622 (same); *United States* v. *Jankowski*, 28 F. 2d 800 (C. C. A. 2) (liquor found in car being stopped to notify driver to fix headlights); *United States* v. *Old Dominion Warehouse*, 10 F. 2d 736 (C. C. A. 2) (seizure of 4867½ cases of various kinds of intoxicating liquor held proper under search warrant for 10 or 12 barrels of intoxicating liquor); *Milam* v. *United States*, 296 Fed. 629 (C. C. A. 4), certiorari denied, 265 U. S. 586 (aliens unlawfully in U. S. discovered in truck stopped on reasonable belief it was carrying liquor); *United States* v. *Charles*, 8 F. 2d 302 (N. D. Calif.) (liquor seized in course of search for narcotics); *United States* v. *Seltzer*, 5 F. 2d 364 (D. Mass.) (counterfeit bond strip label stamps seized in search for liquor); *United States* v. *Camarota*, 278 Fed. 388 (S. D. Calif.) (still seized in search for liquor).

It is, of course, true that Section 3116 of the Internal Revenue Code, after declaring unlawful the possession of liquor or property intended for use in the violation of the revenue laws, provides for seizure of such property under a warrant (Appendix, *infra*, pp. 50–51). That section, however, applies only when the entry must be made to

seize; it has never been interpreted as requiring a warrant where, after a lawful entry for another purpose, the contraband property is before the eyes of the enforcing officers, or where possession of the property is obtained by some means other than a warrant. Section 3116 of the Internal Revenue Code had its origin in Section 25 of the National Prohibition Act (41 Stat. 315, Appendix, *infra*, p. 53), which contained a similar provision outlawing property rights in liquor or property used in the manufacture of liquor and providing for the seizure of such property by search warrant. Yet, as we have shown, this Court in the *Steele* case, recognized that agents could properly take contraband not described in the warrant which they were executing. Throughout the prohibition era, the circuit courts of appeal consistently held admissible in evidence contraband liquor or contraband apparatus seized pursuant to a lawful arrest. *Vachina* v. *United States*, 283 Fed. 35, 36 (C. C. A. 9); *McBride* v. *United States*, 284 Fed. 416 (C. C. A. 5), certiorari denied, 261 U. S. 614; *Sayers* v. *United States*, 2 F. 2d 146, 147 (C. C. A. 9); *Miller* v. *United States*, 9 F. 2d 382, 383 (C. C. A. 9); *Benton* v. *United States*, 28 F. 2d 695, 697 (C. C. A. 4); *Samson* v. *United States*, 26 F. 2d 769, 770 (C. C. A. 1); *Smallwood* v. *United States*, 68 F. 2d 244, 246 (C. C. A. 5); *Crace* v. *United States*, 44 F. 2d 894, 895 (App. D. C.); *Todd* v. *United States*, 48 F. 2d 530, 532 (C. C. A. 5); *Vecchio* v. *United States*, 53 F. 2d

628, 631 (C. C. A. 8); *Cardinal* v. *United States*, 79 F. 2d 825, 826 (C. C. A. 6); *McShann* v. *United States*, 67 F. 2d 655, 656 (C. C. A. 10). This right to seize incident to an arrest was upheld even where the arrest was made in a private dwelling. *Wida* v. *United States*, 52 F. 2d 424 (C. C. A. 8). The courts also upheld seizure of liquor after entry was made for a purpose other than arrest, or where possession was lawfully obtained by some means other than a warrant. *Dillon* v. *United States*, 279 Fed. 639, 647 (C. C. A. 2); *United States* v. *Old Dominion Warehouse*, 10 F. 2d 736, 738 (C. C. A. 2); *Avignone* v. *United States*, 12 F. 2d 509 (C. C. A. 2); *The Ng Ka Py Cases*, 24 F. 2d 772 (C. C. A. 9); *Carvalho* v. *United States*, 54 F. 2d 232, 233 (C. C. A. 1); *United States* v. *135,019 Gallons, More or Less, of Wine*, 56 F. 2d 1064 (D. C. N. D. Calif.); *O'Connor* v. *United States*, 281 Fed. 396 (D. N. J.).

In view of this consistent interpretation of the seizure provision of Section 25 of the National Prohibition Act, it cannot be said that Congress intended a different rule to apply when it in substance enacted the provisions of Section 25 as Section 8 of the Liquor Repeal and Enforcement Act of 1935. To the contrary, the proviso of Section 201 of the 1935 Act referred to, *supra*, pp. 19–20, shows clearly that, in the Liquor Repeal and Enforcement Act, Congress contemplated seizures incident to a lawful arrest as something separate and apart from seizures under Section 8.

The right of seizure incident to a lawful arrest without resort to a warrant under Section 8 of the 1935 Act has been recognized and upheld since the repeal of prohibition. As noted above, it was recognized by this Court in *Scher* v. *United States*, 305 U. S. 251, where liquor was found in a moving vehicle which had come to rest in a garage. Decisions in lower federal courts have similarly upheld the right of seizure incident to an arrest where moving vehicles were not involved. *Crabb* v. *United States*, 99 Fed. 325, 327 (C. C. A. 10); *United States* v. *Feldman*, 104 F. 2d 255 (C. C. A. 3), certiorari denied, 308 U. S. 579; *Shew* v. *United States*, 15 F. 2d 628, 630 (C. C. A. 4), certiorari denied, 328 U. S. 870.

Any other construction would indeed transform into a technicality a principle which was designed to protect a fundamental right. After all, the underlying purpose of requiring a search warrant was to make sure that the privacy of home or office would not be invaded except on probable cause to believe that articles subject to seizure were contained therein. But once that privacy has been lawfully invaded, once the entry has been lawfully made, no rights would be vindicated by requiring law enforcement officers to disregard objects which are there before their eyes. The entry, the breach of the castle wall, has already occurred; the illegal objects in which a defendant has no property right have already been

uncovered. What advantage would there be in requiring a warrant in such a situation? Assuming that, in this case, a warrant should be held necessary to justify the seizure, but not the entry, and that the still, vats, and cans seized could properly be suppressed as evidence, what would petitioners gain? They have no property right in the articles, and therefore no right to have them returned. See Rule 41 (e), F. R. Crim. P., providing for the restoration of property illegally seized "unless otherwise subject to lawful detention." They might, under the rule, have the physical exhibits suppressed as evidence and thus prevent their production in court. But if the arrest is legal there is no reason why, even if the evidence should be suppressed, the agents could not testify to what they saw at the time of the valid arrest. The subsequent illegal seizure, assuming it was such, would not invalidate a previous valid arrest. See *Zap* v. *United States,* 328 U. S. 624, 629; *United States* v. *Lee,* 274 U. S. 559, 563; *McGuire* v. *United States,* 273 U. S. 95. For in this type of situation, where there is a seizure of property open to view at the time the arrest is made, the advantage of a warrant—i. e., the substitution of the judgment of a judicial officer as to the existence of probable cause for the judgment of a law enforcement officer—goes only to the arrest, and not to the seizure. And as to the arrest, as we have shown, the whole course of

historical development makes it clear that the decision whether or not to require a warrant is for the legislature and not for the courts.

A holding that contraband open to view at the time of arrest may be seized at the time of the arrest, whether or not the property could have been obtained in another way by means of a search warrant, does not, as has been intimated, render search warrants superfluous. Search warrants continue to be necessary for the purpose which they have historically always served—the purpose of searching for illegal articles to be seized without arrest, such as smuggled goods, or to be used as evidence upon which an arrest can then be made. See the discussion in 2 Hale, *Pleas of the Crown* 114, regarding search warrants for stolen property: "4. But because the having of stolen goods in his custody is *prima facie* an evidence of a felony and a good cause of suspicion, it is a lawful clause in the warrant to attach the party, in whose custody they are found * * *." After all, when it was questioned whether warrants should be issued, even to recover stolen property (see *Entick* v. *Carrington,* 19 How. St. Tr. 1029, 1067), it is unlikely that there was any idea that, after an offender had been apprehended and the stolen property identified in his possession, the government or the owner would have to resort to an action in replevin to get back the property. And in the years when statutes authorizing the issuance of search warrants were limited to certain

specified objects,"[11] it was, as the cases cited above indicate, neither the practice nor the theory that instrumentalities of the crime for which an arrest was made, such as a gun, were immune from seizure because not mentioned in the specific statutes permitting issuance of search warrants, or because warrants for goods mentioned in such statutes were not issued before the arrest. As this Court in effect held in the *Harris* case, the right of search incident to a lawful arrest has historically always been a right outside the field of law relating to search warrants as such. And certainly the right to seize contraband open to view at the time of arrest even more clearly falls outside the field of search warrant law.

In general, it may be said that a search warrant continues to be necessary, either before or after arrest, when the entry, the breach of privacy, is made for the purpose of search or seizure. If entry is made to search after an arrest in a place other than that where the arrest takes place, a warrant is necessary. *Agnello* v. *United States,* 269 U. S. 20. If entry is made to search or seize without an arrest, a warrant is necessary. *Taylor* v. *United States,* 286 U. S. 1; *Johnson* v. *United States,* No. 329, this Term, decided Feb. 2, 1948.

[11] E. g., Mass. Rev. Stat. (1836), c. 142, secs. 1–2; 3 N. Y. Rev. Stat. (1859), p. 1040. See federal statutes listed by Frankfurter, J., dissenting in *Davis* v. *United States,* 328 U. S. 582, at 616–623.

It is in such situations, where the entry is made for the purpose of search or seizure, that time to obtain a warrant becomes of the essence. Where the warrant is the means of establishing legal entry, the key to unlock the doors of privacy, this Court has held that a warrant, the key, must be obtained when time to obtain one exists. Thus, in *Taylor* v. *United States,* 286 U. S. 1, where agents entered a garage, not to arrest, but to seize, this Court held that the entry and the subsequent seizure were illegal because the agents had ample time to obtain a warrant. *Accord: Johnson* v. *United States,* No. 329, this Term, *supra.* But in the *Taylor* case, there was no basis for entry other than the desire to search and seize, and this Court specifically said that it was unnecessary to discuss "the rule in respect of searches in connection with an arrest" (286 U. S. at p. 6). In the *Johnson* case, this Court held that the officers did not have sufficient information to justify an arrest before they entered the premises, so that this Court found that the entry was made to search, rather than to arrest.

In *Carroll* v. *United States,* 267 U. S. 132, on the other hand, even though there was no right to arrest, this Court held that a search without a warrant was justified, and that the evidence uncovered by the search warrant could form the basis of a subsequent arrest because, in the case

of a moving vehicle, it would be impracticable to obtain a search warrant. While, in part, that decision was based on the specific provisions of Section 26 of the National Prohibition Act, the opinion of the court makes it clear that the statute was found to be constitutional because of its inherent reasonableness. As pointed out above, the principle of the *Carroll* case was applied by this Court in the *Scher* case, 305 U. S. 251, after the repeal of Section 26 of the National Prohibition Act.

In *Go-Bart Co.* v. *United States,* 282 U. S. 344, 358, this Court mentioned, as one of the factors rendering the search in that case unreasonable, the fact that agents had opportunity to obtain a warrant. But the whole basis of that decision was the fact that the arrest in that case was merely a pretext for an invalid search for evidence, so that the entry was primarily for the purpose of search, and not for the purpose of arrest. The Court specifically pointed out that no crime was being committed at the time the arrest was made. 282 U. S. at 357.

None of the cases in this Court which discuss the question of time to obtain a search warrant touch the situation where entry is lawfully made for some other purpose and where, after lawful entry,[12] the contraband property is found in open

[12] The Second Circuit cases on which petitioner relies (Br. 24–25) also involve situations where the entry was made to

view. On the contrary, as we pointed out, *supra*, p. 34, this Court in the *Steele* case, 267 U. S. 498, specifically recognized that contraband uncovered in a search under a warrant could be seized after entry under the warrant, and in the *Marron* case, 275 U. S. 192, it held that instrumentalities of the crime, not in themselves contraband, could be seized, although not mentioned in the warrant, where entry had been made under the warrant and a lawful arrest effected. In other words, both those cases hold definitely, in accordance with well established law, that where an entry is lawfully made, a warrant is not necessary to justify the seizure of contraband or instrumentalities of the crime.

The time to obtain a warrant loses all significance where the warrant does not serve the function of a key justifying entry, particularly where, as here, there is no search, but merely sei-

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search and not for some other lawful purpose. In *United States* v. *Kaplan*, 89 F. 2d 869, the court found that the officers did not have sufficient probable cause for the arrest on which the search was based. In *United States* v. *Edelson*, 83 F. 2d 404, there was no arrest, and in *In re Milburne*, 77 F. 2d 310, the search preceded the arrest. The Second Circuit has in fact very clearly articulated the principle referred to above, that contraband may be seized without a warrant when discovered after a lawful entry for another purpose. *In re 14 East 17th Street*, 65 F. 2d 289; *United States* v. *Two Soaking Units*, 48 F. 2d 107, certiorari denied, 284 U. S. 627; *United States* v. *Old Dominion Warehouse*, 10 F. 2d 736.

zure of articles in which defendants have no property right. The time to obtain a warrant loses all significance because the warrant itself has, as we have shown, no function to serve in such a situation. In that kind of situation, the factor of opportunity to obtain a warrant goes to the reasonableness of the arrest and not of the seizure, and the reasonableness of arrest without a warrant is a matter for legislative, not judicial judgment.[13]

CONCLUSION

Since, historically and by statute, an arrest without a warrant may be made even though time exists to obtain a warrant, contraband open to view at the time of the arrest may properly be seized without a warrant, although there is time for the arresting officers to obtain a search war-

[13] In their brief petitioners for the first time raise the contention that Nilsen's act in abstracting samples of each run of alcohol and other articles while he was working for petitioners in an undercover capacity constituted an illegal search and that the district court should have directed the return of such property (Br. 32–33). That question is not before this Court. While petitioners' notice of a petition to suppress evidence referred to "all papers, records and documents and other property seized by the Government" (R. 2), the petition to suppress itself referred only to the property seized on the night of June 3 (R. 3). The district judge's opinion (R. 103–106) shows that he considered that the only question before him was the legality of the seizure on the night of June 3.

rant. We therefore respectfully submit that the judgment below should be affirmed.

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FEBRUARY 1948.

APPENDIX

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The pertinent provisions of the Internal Revenue Code (26 U. S. C.) are:

> § 2810. (a) Requirement. Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is, by subscribing and filing with him duplicate statements, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; one of which statements shall be retained and preserved by the collector, and the other transmitted by him to the Commissioner. Stills and distilling apparatus shall be registered immediately upon their being set up.
>
> Every still or distilling apparatus not so registered, together with all personal property in the possession or custody, or under

the control of such person, and found in the building, or in any yard or inclosure connected with the building in which the same may be set up, shall be forfeited.

And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years.

* * * * *

§ 2814. Every person intending to commence or to continue the business of a distiller shall, on filing with the collector his notice of such intention, and before proceeding with such business, and on the 1st day of May of each succeeding year, execute a bond in the form prescribed by the Commissioner, * * *

* * * * *

Every person who fails or refuses to give the bond hereinbefore required, or to renew the same, or who gives any false, forged, or fraudulent bond, shall forfeit the distillery, distilling apparatus, and all real estate and premises connected therewith, and shall be fined not less than $500 nor more than $5,000, and imprisoned not less than six months nor more than two years.

* * * * *

§ 2831. Every person engaged in distilling or rectifying spirits, and every wholesale liquor dealer, shall place and keep conspicuously on the outside of the place of such business a sign, exhibiting in plain and legible letters, not less than three

inches in length, painted in oil-colors or gilded, and of a proper and proportionate width, the name or firm of the distiller, rectifier, or wholesale dealer, with the words: "Registered distillery," "rectifier of spirits," or "wholesale liquor dealer," as the case may be. Every person who violates the foregoing provision by negligence or refusal, or otherwise, shall pay a penalty of $500.

* * * * *

§ 2833. Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises, and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person, who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or

suffered any building, yard, or inclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard, or inclosure, and all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States.

* * * * *

§ 2834. No mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; * * *. Every person who violates any provision of this section shall be fined for each offense not less than $500 nor more than $5,000, and be imprisoned not less than six months nor more than two years. * * *

* * * * *

§ 3116. It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in title XI of the Act of June 15, 1917, 40 Stat. 228 (U. S. C., Title 18, §§ 611–633), for the seizure of such liquor or property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal-revenue laws, or of any other law. The seizure and forfeiture of any liquor or prop-

erty under the provisions of this part, and the disposition of such liquor or property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such liquor or property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal-revenue laws.

§ 3117. (a) The Commissioner, his assistants, agents, and inspectors, shall investigate and report violations of this part to the United States attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States; and the Commissioner, his assistants, agents, and inspectors, may swear out warrants before United States Commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. Section 1014 of the Revised Statutes (U. S. C., Title 18, § 591) is hereby made applicable in the enforcement of this part. Officers mentioned in said section 1014 are authorized to issue search warrants under the limitations provided in title XI of the Act of June 15, 1917, 40 Stat. 228 (U. S. C., Title 18, §§ 611–633).

* * * * * * *

§ 3121. (a) The Commissioner, his assistants, agents, and inspectors, and all other

officers, employees, or agents of the United States, whose duty it is to enforce criminal laws, shall have all the rights, privileges, powers, and protection in the enforcement of the provisions of this part which are conferred by law for the enforcement of any laws in respect of the taxation, importation, exportation, transportation, manufacture, possession, or use of, or traffic in, intoxicating liquors.

The Act of March 1, 1879, c. 125, sec. 9, 20 Stat. 327 (18 U. S. C. 593) provides:

Where any marshal or deputy marshal of the United States within the district for which he shall be appointed shall find any person or persons in the act of operating an illicit distillery, it shall be lawful for such marshal or deputy marshal to arrest such person or persons, and take him or them forthwith before some judicial officer named in section one thousand and fourteen of the Revised Statutes, who may reside in the county of arrest or if none, in that nearest to the place of arrest, to be dealt with according to the provisions of sections ten hundred and fourteen, ten hundred and fifteen, ten hundred and sixteen of the said Revised Statutes.

The pertinent provisions of the National Prohibition Act of October 28, 1919, c. 85, Tit. II, 41 Stat. 307, *et seq.*, are as follows:

SEC. 2. The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this Act to the United States attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction

of the Attorney General, as in the case of other offenses against the laws of the United States; and such Commissioner of Internal Revenue, his assistants, agents, and inspectors may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. Section 1014 of the Revised Statutes of the United States is hereby made applicable in the enforcement of this Act. Officers mentioned in said section 1014 are authorized to issue search warrants under the limitations provided in Title XI of the Act approved June 15, 1917 (Fortieth Statutes at Large, page 217, et seq.).

* * * * *

SEC. 25. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. No search warrant shall issue

to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process.

SEC. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof.

* * * * * *

SEC. 28. The commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States.

The pertinent provisions of the Liquor Law Repeal and Enforcement Act of August 27, 1935, c. 740, 49 Stat. 872, are:

SEC. 3. The Commissioner, his assistants, agents, and inspectors, shall investigate and report violations of this title and of Title III of the National Prohibition Act to the United States attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States; and the Commissioner, his assistants, agents, and inspectors, may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. Section 1014 of the Revised Statutes is hereby made applicable in the enforcement of this title and of Title III of the National Prohibition Act. Officers mentioned in said section 1014 are authorized to issue search warrants under the limitations provided in title XI of the Act approved June 15, 1917 (40 Stat. 228; 18 U. S. C., secs. 611–633).

* * * * *

SEC. 8. It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this title, or of Title III of the National Prohibition Act, or the internal-revenue laws, or regulations prescribed under such title or laws, or which has

been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in title XI of the Act approved June 15, 1917 (40 Stat. 228; 18 U. S. C., secs. 611-633), for the seizure of such liquor or property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal-revenue laws, or of any other law. The seizure and forfeiture of any liquor or property under the provisions of this title, or under the provisions of Title III of the National Prohibition Act, and the disposition of such liquor or property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such liquor or property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal-revenue laws.

SEC. 9. The Commissioner, his assistants, agents, and inspectors, and all other officers, employees, or agents of the United States, whose duty it is to enforce criminal laws, shall have all the rights, privileges, powers, and protection in the enforcement of the provisions of this title and of Title III of the National Prohibition Act, which are conferred by law for the enforcement of any laws in respect of the taxation, importation, exportation, transportation, manufacture, possession, or use of, or traffic in, intoxicating liquors.

* * * * * *

SEC. 201. Any officer, agent, or employee of the United States engaged in the enforcement of any law of the United States who shall search any private dwelling used and occupied as such dwelling without a

warrant directing such search, or who, while engaged in such enforcement, shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than $1,000, and for a subsequent offense not more than $1,000, or imprisoned not more than one year, or both such fine and imprisonment: *Provided,* That nothing herein contained shall apply to any officer, agent, or employee of the United States serving a warrant of arrest, or arresting or attempting to arrest any person committing or attempting to commit an offense in the presence of such officer, agent, or employee, or who has committed, or who is suspected on reasonable grounds of having committed, a felony.

U. S. GOVERNMENT PRINTING OFFICE: 1940

SUPREME COURT OF THE UNITED STATES

No. 427.—October Term, 1947.

Jack Trupiano, Romildo Riccardelli, Anthony Antoniole and Riordan J. A. Roett, Jr., Petitioners, v. United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[June 14, 1948.]

Mr. Justice Murphy delivered the opinion of the Court.

This case adds another chapter to the body of law growing out of the Fourth Amendment to the Constitution of the United States. That Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In other words, the Fourth Amendment is a recognition of the fact that in this nation individual liberty depends in large part upon freedom from unreasonable intrusion by those in authority. It is the duty of this Court to give effect to that freedom.

In January, 1946, the petitioners sought to lease part of the Kell farm in Monmouth County, New Jersey, and to erect a building thereon. Kell suspected that they intended to build and operate an illegal still. He accordingly reported the matter to the appropriate federal authority, the Alcohol Tax Unit of the Bureau of Internal Revenue. The federal agents told Kell to accept the proposition, provided he did nothing to entice or encourage the petitioners into going ahead with their plans and

provided he kept the agents informed of all developments. Nilsen, one of the agents, was assigned in February to work on the farm in the disguise of a "dumb farm hand" and to accept work at the still if petitioners should offer it.

Toward the end of March, 1946, Kell agreed with petitioners to let them rent part of his farm for $300 a month. Kell and Nilsen assisted petitioners in the erection of the building, a roughly constructed barn about 200 yards from the Kell farmhouse. Nilsen also assisted in the erection of the still and the vats.

Operation of the still began about May 13, 1946. Nilsen thereafter worked as "mash man" at a salary of $100 a week, which he turned over to the Government. During this period he was in constant communication with his fellow agents. By prearrangement, he would meet one or more of the agents at various places within a few miles of the Kell farm; at these meetings "the conversation would be about the still building I had assisted in erecting or about the illicit distillery that I was working at on the Kell farm." On May 20 he met with one of his superior officers and gave him samples of alcohol, several sugar bags, a yeast wrapper and an empty five-gallon can which had been taken from the still premises.

On May 26 Nilsen received a two-way portable radio set from his superiors. He used this set to transmit frequent bulletins on the activities of the petitioners. On the basis of radio intelligence supplied by Nilsen, a truckload of alcohol was seized on May 31 about an hour after it had left the farm.

At about 9 p. m. in the evening of June 3, 1946, Nilsen radioed his superior that the still operators were awaiting the arrival of a load of sugar and that alcohol was to be taken from the farm when the sugar truck arrived. Nilsen apparently knew then that a raid was scheduled for that night, for he told Kell during the evening that "tonight is the night." He radioed at 11 p. m. that the

truck had been delayed but that petitioners Roett and Antoniole were at the still.

Three federal agents then drove to within three miles of the farm, at which point they were met by Kell. The remainder of the distance was traversed in Kell's automobile. They arrived at the farm at about 11:45 p. m. The agents stated that the odor of fermenting mash and the sound of a gasoline motor were noticeable as the car was driven onto the farm premises; the odor became stronger and the noise louder as they alighted from the car and approached the building containing the still. Van De Car, one of the agents, went around one end of the building. Looking through an open door into a dimly lighted interior he could see a still column, a boiler and a gasoline pump in operation. He also saw Antoniole bending down near the pump. He entered the building and placed Antoniole under arrest. Thereupon he "seized the illicit distillery."

After this arrest and seizure, Van De Car looked about further and observed a large number of five-gallon cans which he later found to contain alcohol and some vats which contained fermenting mash. Another agent, Casey, testified that he could see several of these cans through the open door before he entered; he subsequently counted the cans and found that there were 262 of them. After he entered he saw the remainder of the distillery equipment, including four large mash vats. The third agent, Gettel, proceeded to a small truck standing in the yard and "searched it thoroughly for papers and things of an evidentiary nature." It does not appear whether he was successful in his search or whether he took anything from the truck.

A few minutes later Roett was arrested outside the building. Petitioners Trupiano and Riccardelli apparently were arrested later that night by other agents, the place and the circumstances not being revealed by the

record before us. In addition, three other persons were arrested that night because of their connections with the illegal operations; one of them, who was unknown to Nilsen, was arrested when he arrived at the farm with a truck loaded with coke.

The agents engaged in this raid without securing a search warrant or warrants of arrest. It is undenied that they had more than adequate opportunity to obtain such warrants before the raid occurred, various federal judges and commissioners being readily available.

All of the persons arrested were charged with various violations of the Internal Revenue Code arising out of their ownership and operation of the distillery. Prior to the return of an indictment against them, the four petitioners filed in the District Court for the District of New Jersey a motion alleging that the federal agents had illegally seized "a still, alcohol, mash and other equipment," and asking that "all such evidence" be excluded and suppressed at any trial and that "all of the aforesaid property" be returned. The District Court denied the motion after a hearing, holding that the seizure was reasonable and hence constitutional. 70 F. Supp. 764. The Circuit Court of Appeals for the Third Circuit affirmed *per curiam* the order of the District Court. 163 F. 2d 828.

Thus we have a case where contraband property was seized by federal agents without a search warrant under circumstances where such a warrant could easily have been obtained. The Government, however, claims that the failure to secure the warrant has no effect upon the validity of the seizure. Reference is made to the well established right of law enforcement officers to arrest without a warrant for a felony committed in their presence, *Carroll* v. *United States*, 267 U. S. 132, 156–157, a right said to be unaffected by the fact that there may have been adequate time to procure a warrant of arrest. Since one of the petitioners, Antoniole, was arrested while engaged in operating an illegal still in the presence of

agents of the Alcohol Tax Unit, his arrest was valid under this view even though it occurred without the benefit of a warrant. And since this arrest was valid, the argument is made that the seizure of the contraband open to view at the time of the arrest was also lawful. Reliance is here placed on the long line of cases recognizing that an arresting officer may look around at the time of the arrest and seize those fruits and evidences of crime or those contraband articles which are in plain sight and in his immediate and discernible presence. *Weeks* v. *United States*, 232 U. S. 383, 392; *Carroll* v. *United States*, *supra*, 158; *Agnello* v. *United States*, 269 U. S. 20, 30; *United States* v. *Lee*, 274 U. S. 559, 563; *Marron* v. *United States*, 275 U. S. 192, 198–199; *Go-Bart Co.* v. *United States*, 282 U. S. 344, 358; *United States* v. *Lefkowitz*, 285 U. S. 452, 465; *Harris* v. *United States*, 331 U. S. 145, 150–151.

We sustain the Government's contention that the arrest of Antoniole was valid. The federal agents had more than adequate cause, based upon the information supplied by Nilsen, to suspect that Antoniole was engaged in felonious activities on the farm premises. Acting on that suspicion, the agents went to the farm and entered onto the premises with the consent of Kell, the owner. There Antoniole was seen through an open doorway by one of the agents to be operating an illegal still, an act felonious in nature. His arrest was therefore valid on the theory that he was committing a felony in the discernible presence of an agent of the Alcohol Tax Unit, a peace officer of the United States. The absence of a warrant of arrest, even though there was sufficient time to obtain one, does not destroy the validity of an arrest under these circumstances. Warrants of arrest are designed to meet the dangers of unlimited and unreasonable arrests of persons who are not at the moment committing any crime. Those dangers, obviously, are not present where a felony plainly occurs before the eyes of an officer of the law at a place where he is lawfully present. Common sense then

dictates that an arrest in that situation is valid despite the failure to obtain a warrant of arrest.

But we cannot agree that the seizure of the contraband property was made in conformity with the requirements of the Fourth Amendment. It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable. *Carroll* v. *United States, supra,* 156; *Go-Bart Co.* v. *United States, supra,* 358; *Taylor* v. *United States,* 286 U. S. 1, 6; *Johnson* v. *United States,* 333 U. S. 10, 14–15. This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. *United States* v. *Lefkowitz, supra,* 464. In their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed. To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement.

The facts of this case do not measure up to the foregoing standard. The agents of the Alcohol Tax Unit knew every detail of the construction and operation of the illegal distillery long before the raid was made. One of them was assigned to work on the farm along with the illicit operator, making it possible for him to secure and report the minutest facts. In cooperation with the farm owner, who served as an informer, this agent was in a position to supply information which could easily have formed the basis for a detailed and effective search warrant. Concededly, there was an abundance of time

during which such a warrant could have been secured, even on the night of the raid after the odor and noise of the distillery confirmed their expectations. And the property was not of a type that could have been dismantled and removed before the agents had time to secure a warrant; especially is this so since one of them was on hand at all times to report and guard against such a move. See *United States* v. *Kaplan*, 89 F. 2d 869, 871.

What was said in *Johnson* v. *United States*, *supra*, 15, is equally applicable here: "No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. . . . If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required."

And so when the agents of the Alcohol Tax Unit decided to dispense with a search warrant and to take matters into their own hands, they did precisely what the Fourth Amendment was designed to outlaw. Uninhibited by any limitations that might have been contained in a warrant, they descended upon the distillery in a midnight raid. Nothing circumscribed their activities on that raid except their own good senses, which the authors of the Amendment deemed insufficient to justify a search or seizure except in exceptional circumstances not here present. The limitless possibilities afforded by the absence of a warrant were epitomized by the one agent who admitted searching "thoroughly" a small truck parked in the farmyard for items of an evidentiary character. The fact that they actually seized only contraband property, which would doubtless have been described in a warrant had one been issued, does not detract from the

illegality of the seizure. See *Amos* v. *United States*, 255 U. S. 313; *Byars* v. *United States*, 273 U. S. 28; *Taylor* v. *United States*, *supra*.

Moreover, the proximity of the contraband property to the person of Antoniole at the moment of his arrest was a fortuitous circumstance which was inadequate to legalize the seizure. As we have seen, the existence of this property and the desirability of seizing it were known to the agents long before the seizure and formed one of the main purposes of the raid. Likewise, the arrest of Antoniole and the other petitioners in connection with the illicit operations was a foreseeable event motivating the raid. But the precise location of the petitioners at the time of their arrest had no relation to the foreseeability or necessity of the seizure. The practicability of obtaining a search warrant did not turn upon whether Antoniole and the others were within the distillery building when arrested or upon whether they were then engaged in operating the illicit equipment. Antoniole just happened to be working amid the contraband surroundings at 11:45 p. m. on the night in question, while the other three petitioners chanced to be some place else. But Antoniole might well have been outside the building at that particular time. If that had been the case and he had been arrested in the farmyard, the entire argument advanced by the Government in support of the seizure without warrant would collapse. We do not believe that the applicability of the Fourth Amendment to the facts of this case depends upon such a fortuitous factor as the precise location of Antoniole at the time of the raid.

In other words, the presence or absence of an arrestee at the exact time and place of a foreseeable and anticipated seizure does not determine the validity of that seizure if it occurs without a warrant. Rather the test is the apparent need for summary seizure, a test which clearly is not satisfied by the facts before us.

A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity that merely a lawful arrest. The mere fact that there is a valid arrest does not *ipso facto* legalize a search or seizure without a warrant. *Carroll* v. *United States, supra,* 158. Otherwise the exception swallows the general principle, making a search warrant completely unnecessary wherever there is a lawful arrest. And so there must be some other factor in the situation that would make it unreasonable or impracticable to require the arresting officer to equip himself with a search warrant. In the case before us, however, no reason whatever has been shown why the arresting officers could not have armed themselves during all the weeks of their surveillance of the locus with a duly obtained search warrant—no reason, that is, except indifference to the legal process for search and seizure which the Constitution contemplated.

We do not take occasion here to reexamine the situation involved in *Harris* v. *United States, supra.* The instant case relates only to the seizure of contraband the existence and precise nature and location of which the law enforcement officers were aware long before making the lawful arrest. That circumstance was wholly lacking in the *Harris* case, which was concerned with the permissible scope of a general search without a warrant as an incident to a lawful arrest. Moreover, the *Harris* case dealt with the seizure of Government property which could not have been the subject of a prior search warrant, it having been found unexpectedly during the course of a search. In contrast, the contraband seized in this case could easily have been specified in a prior search warrant. These factual differences may or may not be of significance so far as general principles are concerned. But the differences

are enough to justify confining ourselves to the precise facts of this case, leaving it to another day to test the *Harris* situation by the rule that search warrants are to be obtained and used wherever reasonably practicable.

What we have here is a set of facts governed by a principle indistinguishable from that recognized and applied in *Taylor* v. *United States, supra.* The Court there held that the seizure of illicit whiskey was unreasonable, however well-grounded the suspicions of the federal agents, where there was an abundant opportunity to obtain a search warrant and to proceed in an orderly, judicial way. True, the *Taylor* case did not involve a seizure in connection with an arrest. And the officers there made an unlawful entry onto the premises. But those factors had no relation to the practicability of obtaining a search warrant before making the seizure. It was the time element and the foreseeability of the need for a search and seizure that made the warrant essential. The *Taylor* case accordingly makes plain the illegality of the seizure in the instant proceeding.

The Fourth Amendment was designed to protect both the innocent and the guilty from unreasonable intrusions upon their right of privacy while leaving adequate room for the necessary processes of law enforcement. The people of the United States insisted on writing the Fourth Amendment into the Constitution because sad experience had taught them that the right to search and seize should not be left to the mere discretion of the police, but should as a matter of principle be subjected to the requirement of previous judicial sanction wherever possible. The effective operation of government, however, could hardly be embarrassed by the requirement that arresting officers who have three months within which to secure the authorization of judicial authority for making search and seizure should secure such authority and not be left to their own discretion as to what is

to be searched and what is to be seized. Such a requirement partakes of the very essence of the orderly and effective administration of the law.

It is a mistake to assume that a search warrant in these circumstances would contribute nothing to the preservation of the rights protected by the Fourth Amendment. A search warrant must describe with particularity the place to be searched and the things to be seized. Without such a warrant, however, officers are free to determine for themselves the extent of their search and the precise objects to be seized. This is no small difference. It is a difference upon which depends much of the potency of the right of privacy. And it is a difference that must be preserved even where contraband articles are seized in connection with a valid arrest.

It follows that it was error to refuse petitioners' motion to exclude and suppress the property which was improperly seized. But since this property was contraband, they have no right to have it returned to them.

Reversed.

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[June 14, 1948.]

Mr. Chief Justice Vinson, with whom Mr. Justice Black, Mr. Justice Reed and Mr. Justice Burton concur, dissenting.

Federal officers, following a lawful arrest, seized contraband materials which were being employed in open view in violation and defiance of the laws of the land. Today, the Court for the first time has branded such a seizure illegal. Nothing in the explicit language of the Fourth Amendment dictates that result. Nor is that holding supported by any decision of this Court.

The material facts are not in dispute. In January, 1946, certain of the petitioners approached one Kell offering to rent a portion of the latter's farm on which a building was to be erected. His suspicions aroused, Kell reported the matter to agents of the Alcohol Tax Unit of the Bureau of Internal Revenue. He was advised that the offer could be accepted provided that nothing was done to entice petitioners into completion of their plans. An agent, Nilsen, was assigned to the farm to act the part of a farm hand in the employ of Kell.

Ultimately, an agreement was entered into whereby Kell rented a portion of his farm to petitioners at $300 a month. Petitioners, with the assistance of Kell and

Nilsen, constructed a barn-like structure some two hundred yards from the farmhouse. A still and vats were installed. After the still began operation, Nilsen acted as a "mash man" receiving a salary of $100 a week from petitioners. All sums received by Nilsen were turned over to the Federal Government.

Throughout this period, Nilsen reported regularly to his superiors. As a result of this information, federal agents on May 31, 1946, seized a truckload of alcohol about an hour after it had left the Kell farm.

The night of June 3, 1946, was chosen by the agents to conduct their raid. Kell cooperated fully with the officers and drove three of the agents to the farm in his own car. As the car entered the farm premises, the odor of fermenting mash and the sound of a gasoline motor became apparent. When the agents alighted from the car it was obvious that the sound and the odor were emanating from the building in which the still was located. One of the agents approached the structure and through an open door observed a still and a boiler. He also saw the petitioner Antoniole bending over a gasoline pump. The agent entered the building and placed Antoniole under arrest on the theory that a crime was being committed in his presence. Subsequently, the agent seized the still, mash vats containing fermenting mash, other distillery equipment, and 262 five-gallon cans containing illicit alcohol. Neither the arrest nor the seizure was effected under the authority of a warrant. Later six other persons were arrested, including three of the petitioners in this case.[1]

[1] Subsequently, petitioners moved the District Court to order the return of the property seized and to suppress its use as evidence. 70 F. Supp. 764 (1947). The motion was denied. The order was affirmed by the Circuit Court of Appeals in a *per curiam* statement. 163 F. 2d 828 (1947).

There can be no doubt that the activities of petitioners were in flagrant violation of the laws of the United States.[2] It is clear, also, that the materials seized consisted of instrumentalities used by petitioners in their criminal enterprise and contraband goods, possession of which is a crime. The materials and objects falling into the control of the federal agents, therefore, were of the type properly subject to lawful seizure.[3]

Further, it is obvious that entry of the federal agents onto the farm premises was in no sense trespassory or otherwise illegal. *Amos* v. *United States*, 255 U. S. 313 (1921); *Byars* v. *United States*, 273 U. S. 28 (1927). Kell, the owner of the farm, gave his active consent to the entry. Indeed, he voluntarily drove three of the agents to the premises in his own car.

Nor can there be doubt that the arrest of the petitioner Antoniole while engaged in the commission of a felony in the presence of the agent was a valid arrest. The majority of the Court explicitly concedes such to be the fact. Under the English common law, a police officer had power without a warrant to arrest persons committing a misdemeanor in the officer's presence and persons whom the officer had reasonable cause to believe had committed a felony. This rule, which had its origin in the ancient formative period of the common law, was firmly established at the time of the adoption of the Fourth Amend-

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[2] See §§ 2803, 2810, 2812, 2814, 2831, 2833 of the Internal Revenue Code.

[3] *Boyd* v. *United States*, 116 U. S. 616, 623, 624 (1886); *Weeks* v. *United States*, 232 U. S. 383, 392–393 (1914); *Gouled* v. *United States*, 255 U. S. 298, 309 (1921); *Carroll* v. *United States*, 267 U. S. 132, 149–150 (1925); *Agnello* v. *United States*, 269 U. S. 20, 30 (1925); *Marron* v. *United States*, 275 U. S. 192, 199 (1927); *United States* v. *Lefkowitz*, 285 U. S. 452, 465–466 (1932); *Harris* v. *United States*, 331 U. S. 145, 154 (1947).

ment.[4] Since that time it has received general application by state and federal courts.[5] Indeed, this Court has heretofore given specific recognition to the rule. *Carroll v. United States*, 267 U. S. 132, 156–157 (1925).[6]

Thus, even though agents charged with enforcement of the laws of the United States made a lawful entry onto the farm and despite the fact that a valid arrest was made of a party who was in the act of committing a felony, the Court now holds that the arresting officer in the absence of a search warrant was powerless to make a valid seizure of contraband materials located in plain sight in the structure in which the arrest took place. And this despite the long line of decisions in this Court recognizing as consistent with the restrictions of the Fourth Amendment the power of law-enforcement officers to make reasonable searches and seizures as incidents to lawful arrests.

In *Agnello* v. *United States*, 269 U. S. 20, 30 (1925), this Court stated: "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as well as weapons and other things to effect an escape from custody, is not to be doubted. . . . Such searches and seizures naturally and usually appertain to and attend such arrests."[7] And see *Weeks* v. *United States*, 232 U. S. 383, 392 (1914); *Carroll* v. *United States*, *supra* [illegible]158; *United States* v. *Lee*, 274 U. S. 559, 563 (1927); *Marron* v. *United States*, 275 U. S. 192, 198–199

[4] *Samuel* v. *Payne*, 1 Doug. K. B. 359 (1780); *Wakely* v. *Hart*, 6 Binn. 316 (1814). And see 2 Hale, Pleas of the Crown 85–97; 4 Blackstone, Commentaries 292–293; Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 673.

[5] *United States* v. *Daison*, 288 F. 199 (1923); *Rohon* v. *Sawin*, 5 Cush. 281 (1850); *Wade* v. *Chafee*, 8 R. I. 224 (1865).

[6] Cf. *Kurtz* v. *Moffett*, 115 U. S. 487, 498–499 (1885).

[7] And see *id.* at 32, 33.

(1927); *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 358 (1931); *United States* v. *Lefkowitz*, 285 U. S. 452, 465 (1932); *Harris* v. *United States*, 331 U. S. 145, 150–151, 168, 186 (1947).

The validity of the search and seizure as incident to a lawful arrest has been based upon a recognition by this Court that where law-enforcement agents have lawfully gained entrance into premises and have executed a valid arrest of the occupant, the vital rights of privacy protected by the Fourth Amendment are not denied by seizure of contraband materials and instrumentalities of crime in open view or such as may be brought to light by a reasonable search. Here there can be no objection to the scope or intensity of the search. Cf. *Marron* v. *United States, supra*; *Go-Bart Importing Co.* v. *United States, supra*; *United States* v. *Lefkowitz, supra*; *Harris* v. *United States, supra*. The seizure was not preceded by an exploratory search. The objects seized were in plain sight. To insist upon the use of a search warrant in situations where the issuance of such a warrant can contribute nothing to the preservation of the rights which the Fourth Amendment was intended to protect, serves only to open an avenue of escape for those guilty of crime and to menace the effective operation of government which is an essential precondition to the existence of all civil liberties.

In reaching its result the Court relies on *Taylor* v. *United States*, 286 U. S. 1 (1932). There, federal agents broke into a garage and seized a quantity of illicit liquor. At the time of entry, "No one was within the place and there was no reason to think otherwise." *Id.* at 5. The agents acted without the authority of a search warrant, nor, unlike the present case, was lawful entry into the building made for the purpose of effecting a valid arrest. Under these circumstances the Court ruled that the seizure was unlawful. But to apply that holding in a situa-

tion like the present where law-enforcement officers have entered a building to arrest a party openly engaged in the commission of a felony, is to disregard the very basis upon which the *Taylor* case was decided.

We are told, however, that although the petitioner Antoniole was arrested while undeniably engaged in the commission of a felony, his presence in the building in which the contraband materials were located was a "fortuitous circumstance which was inadequate to legalize the seizure." We should suppose that any arrest of a party engaged in the commission of a felony is based in part upon an element of chance. Criminals do not normally choose to engage in felonious enterprises before an audience of police officials. We may well anticipate the perplexity of officers engaged in the practical business of law enforcement when confronted with a rule which makes the validity of a seizure of contraband materials as an incident to a lawful arrest dependent upon subsequent judicial judgment as to the "fortuitous" circumstances relating to the presence of the party arrested on the premises in which the illegal goods are located.

Nor are we free to assume that the agents in this case would have proceeded illegally to seize the materials in the barn in the absence of the justification of a valid arrest. A lawful seizure is not to be invalidated by speculations as to what the conduct of the agents might have been had a different factual situation been presented.

The case of *Johnson* v. *United States*, 333 U. S. 10 (1948), does not support the result which the Court has reached. For there the majority of the Court held that the arrest in question was an invalid one. Obviously, a search and seizure may not be held valid on the sole ground that it was an incident to an invalid arrest. Such is not the situation here.

In *Carroll* v. *United States*, *supra* at 149, this Court observed: "The Fourth Amendment is to be construed in

the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." We believe that the result reached today is not consistent with judicial authority as it existed before the adoption of the Fourth Amendment nor as it has developed since that time. Nor do we feel that the decision commends itself as adapted to conserve vital public and individual interests. Heretofore it has been thought that where officers charged with the responsibility of enforcement of the law have lawfully entered premises and executed a valid arrest, a reasonable accommodation of the interests of society and the individual permits such officials to seize instrumentalities of the crime and contraband materials in open view of the arresting officer. The Court would now condition this right of seizure after a valid arrest upon an *ex post facto* judicial judgment of whether the arresting officers might have obtained a search warrant. At best, the operation of the rule which the Court today enunciates for the first time may be expected to confound confusion in a field already replete with complexities.